Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

October Term, 1994

Haitian Refugee Center, Inc., et al.

Petitioners,

vs.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Immigration and Naturalization Service or the Attorney General may engage in race and/or nationality discrimination against detained unaccompanied minor children in violation of statutory parole authority as found by this Court in *Jean v. Nelson*, 472 U.S. 846 (1985).

Whether the Government may, based on the suspected content of their speech, deny the Haitian Refugee Center, Inc., and pro bono counsel access to unaccompanied minor children and other Haitians on the United States Naval Base in Guantanamo Bay, Cuba, because, in the lower court's view, the Haitians have no rights and therefore no need for counsel.

Whether the discriminatory acts by the Immigration and Naturalization Service or the Attorney General against unaccompanied minor children based on their race and/or national origin are wholly beyond constitutional scrutiny because the children are located at Guantanamo, even though by treaty the Base is within the complete control and jurisdiction of the United States.

PARTIES TO THE PROCEEDINGS

The Petitioners are the Haitian Refugee Center, Inc., a Florida not-for-profit corporation, and Garry Joseph, Paulomme Edmond, Pierre Onel Antoine, Voidieu Jean Louis, Bergeline Jean Louis, and Padeci Jean Louis, each of them on behalf of themselves and all others similarly situated.

The Respondents are Warren Christopher, Secretary of State; William J. Perry, Secretary of Defense; Janet Reno, Attorney General; Brigadier General Michael Williams, Commander, Joint Task Force at the United States Naval Base, Guantanamo Bay, Cuba; Doris Meissner, Commissioner, Immigration and Naturalization Service; the Immigration and Naturalization Service; and the United States.

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OPINIONS BELOW

On January 18, 1995, a panel of the United States Court of Appeals for the Eleventh Circuit, on an appeal from the United States District Court for the Southern District of Florida, entered an opinion with an order, which is reported as *Cuban American Bar Ass'n, Inc., et al. v. Christopher, et al.*, 43 F.3d 1412 (11th Cir. 1995). App. at 1a. The court dissolved the preliminary injunctions in Case Nos. 94-5138, 94-5231, and 94-5234, and remanded the cases to the district court with instructions to dismiss the action. The panel also issued the mandate forthwith. The district court orders giving rise to this appeal, not reported, were issued on November 22, 1994, Appendix ("App.") at 32a, and November 28, 1994. App. at 34a.

On October 23, 1994, the Cuban American Bar Association, Inc. ("CABA"), a Florida not-for-profit corporation and others filed suit (Docket No. 94-2183) for injunctive relief, seeking meaningful access to their clients, Cuban refugees detained in the U.S. Naval Base at Guantanamo Bay, Cuba. On October 31, Petitioners, who sought injunctive relief on behalf of similarly-situated Haitian detainees, were granted the status of provisional plaintiff-intervenors in the action that CABA had commenced. Also on October 31, the district court granted a temporary restraining order ("TRO") sought by CABA. The Government filed an emergency appeal from the October 31 order obtained by CABA on November 1, seeking summary reversal. The Court of Appeals also invited briefing on the appeal from HRC, which HRC provided. By order of November 7, the Court of Appeals upheld that portion of the district court's order that required the Government to allow CABA reasonable access to their clients, while staying only that portion that enjoined voluntary repatriations. App. at 37a.

On November 22, by an order similar to the one granted to CABA, the district court granted the TRO sought by HRC, requiring that the Government provide HRC with access to the

Haitian detainees on Guantanamo and a list of the nam[illegible]ll Haitian detainees. It also directed the Government to parole unaccompanied Haitian minors into the United States in the same manner allowed for unaccompanied Cuban minors who had been detained there in Safe Haven. On November 28, the district court then stayed that portion of its order regarding parole of the Haitian minors and the release of a list of names, but it did not stay the provisions regarding access to the Haitian detainees. App. at 34a. Moreover, the district court, in an oral ruling, converted the TRO into a preliminary injunction, so that it could be immediately appealed. After expedited briefing and argument on appeal on December 19, 1994, a panel of the Eleventh Circuit stayed the district court's orders of October 31, November 22, and November 28. App. at 37a. On January 18, 1995, the panel issued an opinion and dissolved its own December 19 stay, as well as the district court's orders of October 31, November 22, and November 28, and remanded the case with instructions to dismiss.[1]

JURISDICTIONAL STATEMENT

This Petition seeks review of the order of the U.S. Court of Appeals for the Eleventh Circuit of January 18, 1995, dissolving the injunctive relief entered by the district court and instructing the district court to dismiss Petitioners' claims. Petitioner's

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[1] On January 5, 1995, upon learning that the Government had begun involuntary repatriation of the Haitian detainees at Guantanamo, Petitioner HRC had filed, as a separate action, (Docket No. 95-22), a complaint and motion for a TRO in the United States District Court for the Southern District of Florida. That motion was denied by oral order of the district court the same day, and on January 9, 1995, HRC appealed that ruling to the Eleventh Circuit Court of Appeals, seeking summary reversal. On January 11, 1995, the court consolidated that appeal with the cases from which this Petition seeks certiorari. On January 18, 1995, the Eleventh Circuit vacated its order of consolidation and affirmed the district court's denial of a TRO in that separate action. *HRC v. Christopher*, 43 F.3d 1431 (11th Cir. 1995). HRC is not seeking certiorari with respect to that decision.

Verified Complaint had alleged violations of the First and Fifth Amendments to the United States Constitution, the Immigration and Nationality Act, the Administrative Procedure Act, and Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims are based on the First and Fifth Amendments to the United States Constitution, and the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5)(A). The text of these provisions is set forth below.

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1182(d)(5)(A):

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

STATEMENT OF FACTS AND OF THE CASE

The case before this Court turns upon the Government's nakedly discriminatory decisions, dressed in the guise of political expediency. Unaccompanied Haitian refugee children, who have been detained by the Government for several months in the United States Naval Base at Guantanamo Bay ("Guantanamo") under harsh living conditions, without access to legal counsel, upon the Government's promise of Safe Haven, are now being forcibly and involuntarily repatriated. By contrast, similarly situated unaccompanied Cuban refugee children have long since been paroled because of "extraordinary hardship" into this country from Guantanamo. This sharp disparity in the treatment of the Haitian children is in direct violation of prior decisions of this Court and federal statutory law, and this Court should not allow it to continue.

A. Disparate Treatment Of The Cuban And Haitian Refugee Children

Despite State Department concessions that both Cuban and Haitian minors in Safe Haven at Guantanamo were similarly vulnerable, App. at 55a-56a, none of the parole policies instituted for Cuban minors have been extended to the detained Haitian children. Parole into the United States of all unaccompanied Cuban minors detained at Guantanamo was announced by the Immigration and Naturalization Service ("INS") on October 14, 1994. Subsequently, the INS announced a policy providing for parole into the United States of accompanied Cuban minors in Guantanamo and Panama, for whom detention would constitute an "extraordinary hardship," and who have sponsors in the United States, along with accompanying immediate family members. App. at 39a. Even though approximately 230 unaccompanied Haitian children had been held in precisely the same camps as the Cuban minors were held, for at least as long a time, and had endured precisely the same "extraordinary hardship," parole was not extended to the Haitian children. Instead, they have been continually and almost uniformly denied parole.[2] In effect, the Government's December announcement amounted to a statement that those same camps that constituted an "extraordinary hardship" for the Cuban white children nonetheless were good enough for the Haitian black children.

The Haitian children, brought to Guantanamo by U.S. authorities under a grant of Safe Haven warranting parole, had fled, at least since early 1994, a widely publicized and increasing reign of terror perpetrated in Haiti against supporters of ousted President Jean-Bertrand Aristide and their families, largely at

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[2] Reportedly, a very small number of the unaccompanied Haitian children have been granted parole on an individual basis. This stands in sharp contrast to the announcement of a sweeping class grant of parole awarded to the Cuban minors.

the hands of section chiefs appointed by the usurper military regime. App. at 38a. Indeed, the Government has admitted that some of these minors fled "very difficult, traumatic situations," App. at 54a, and life in the camps is yet another harrowing experience for these children. At least one Haitian girl who has relatives in Florida has attempted suicide. App. at 43a. So-called schooling of the minors is "just to keep them occupied and give them something to do." App. at 56a. Although the military's psychological units have influenced adult Haitian decisions to stay or return, App. at 47a, child psychiatrists have not been consulted regarding appropriate means by which the children's needs can be met. "Teachers" and supervisors for the children do not receive special training with respect to their roles. App. at 55a.

In addition, according to reliable press reports after the decision below, the Government has begun involuntary repatriation of these unaccompanied children, children legally incapable of making a voluntary and informed decision to return to Haiti from Safe Haven. With at least eight of these children reportedly having been returned to Haiti, still more enforced repatriations are apparently planned for the immediate future.[3]

B. Safe Haven Status At Guantanamo

The Haitian children detained in Guantanamo were granted Safe Haven status pursuant to a new policy announced by the Government in July, 1994, whereby selected Haitians interdicted at sea by the U.S. Coast Guard were offered Safe Haven at Guantanamo. App. at 66a. A "term of art," "Safe Haven" is a status informed by international law and human rights standards. App. at 60a-61a. It was not automatically awarded to new arrivals at Guantanamo. Screening questions were in place to identify any basis for exclusion, such as criminal behavior. App. at 60a. According to State Department officials, persons in Safe Haven are guaranteed protection and care for so long as they

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[3] Some of these children have relatives in the United States. App. at 43a.

wish to remain. *Id.* It offers "equal protection to all comers who want it. That is what Safe Haven is." App. at 59a. Repatriation from Safe Haven should be made only on a voluntary and informed basis. App. at 66a.

Although there were at one time thousands of Haitian refugees in Safe Haven at Guantanamo, that number has decreased to approximately 500 since the Government began returning them to Haiti, first under the challenged but purportedly "voluntary" repatriation program that deprived Haitians of material information about conditions in Haiti needed for an informed decision, App. at 46a-47a, and then by the repatriation operation which Petitioners were advised had been instituted in December, 1994, after argument below but while this case was pending before the panel below.

C. Access By Petitioner HRC To Haitian Refugees At Guantanamo

The Government not only has detained the Haitian children without the parole awarded to the Cuban children, it also has sought to hold them incommunicado. The record evidence establishes the Government's continued denial of the right of Petitioner Haitian Refugee Center, Inc. ("HRC"),[4] to meet with Haitian refugee clients at Guantanamo.[5] Only after numerous

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[4] HRC is an organization of United States citizens, resident aliens and non-resident aliens, including the individual Haitian refugee petitioners and the parents, relatives, and representatives of some of the unaccompanied minors detained at Guantanamo. App. at 38a.

[5] The Government also has refused to release the names of the Haitian children. At the request of representatives of the Cuban detainees at Guantanamo, the Government released a list identifying all of the more than twenty thousand Cuban detainees. Despite repeated requests by their relatives and friends, as well as by their counsel both informally and by this action, the names of the Haitian detainees have never been provided so that HRC could identify relatives in the U.S. and Haiti and fulfill its counseling function. This refusal prevents the remaining detained Haitian children from even notifying their relatives in Haiti that they survived their treacherous journey at sea and keeps their identity secret from likely relatives in the U.S. App. at 57a.

requests and the threat of a lawsuit were a limited number of HRC attorneys allowed once to visit Guantanamo to meet with Haitian refugees in Safe Haven. The visit was limited to one three-hour period of access; no other visits with Haitian refugees by HRC attorneys were allowed until after this lawsuit was filed. App. at 46a-47a. Also, during the short period of time allowed for the first HRC visit, petty harassment by the Government denied HRC-sponsored attorneys any privacy. INS officials purposely accompanied those lawyers over objection throughout their visit and intruded into meetings with the refugees, thus "nullifying any possibility of meaningful private interaction." *Id.* Worse, meetings between refugees and their counsel were voice videotaped by the Government. Even after the District Court ordered HRC and the Cuban American Bar Association, Inc. ("CABA") meaningful access, the Government continued to "play hardball" and tried to pit CABA and HRC against each other by requiring the attorneys for the Cuban refugees and those for the Haitian refugees to split their narrowly circumscribed time, and to plan visits to their respective clients at their own transportation expense on alternate weeks. App. at 72a.

Finally, the Government has denied HRC the same access to Guantanamo that it has extended freely to other organizations. Amnesty International, for example, was allowed private unsupervised interviews with refugees, and World Relief has been allowed long-term access to the refugees. *See* App. at 70a. Amnesty's favored treatment was the result of the Government's determination that Amnesty is an "objective" organization.

The Government purports to justify the decision to withhold these names on two grounds: (i) alleged security concerns, and (ii) an alleged logistical burden in obtaining Haitian detainees' waivers. App. at 58a. As to the Government's claim that there would be a logistical burden in obtaining waivers from the detainees, Government witnesses are entirely unable to identify or describe what that burden would be. *See, e.g.*, App. at 57a. This claim of burden is particularly insupportable now, since only a few hundred detainees remain at the base.

App. at 62a-63a. The Government's grant of access to other perceived viewpoint "neutral" organizations, while at the same time imposing strict access restrictions on HRC, is compelling evidence of the viewpoint discrimination by the Government.

D. The Government's Untenable Court Rationale For Its Discrimination Against The Haitian Minors

The rationale that the U.S. has put forth in court in this case for the disparate treatment of Haitian and Cuban minors collapses upon examination. It is nothing more than a post-hoc rationalization crafted in order to attempt to salvage the Government's current legal position. In contrast to the "extreme hardship" that the Executive stated as its basis for the parole decisions when they were made, the Government's lawyers now claim to justify discrimination against the detained Haitian children upon purported differences in political climate in the country from which they fled -- between a supposedly harsh and hostile totalitarian Cuba and a Haiti that is supposedly safe, secure, and free of human rights abuses or political repression since the October 15, 1994 return of President Aristide under armed guard. App. at 64a. This belated rationalization, first adopted in court in November, is totally absent from the policy announcements paroling the Cuban minors and from the Government's discriminatory maltreatment of the Haitian children. App. at 39a.

The differences in political climate that the Government claims to perceive, moreover, are illusory. Hundreds of Cuban refugees proved they do not regard Cuba as the dangerous and retaliatory prison state that the Government claims it to be; with U.S. blessing, they voluntarily chose to return from Safe Haven at Guantanamo to sovereign Cuba, preferring conditions there too those of detention at Guantanamo. App. at 67a-68a. Moreover, State Department officials concede that there is *no* evidence of reprisals being carried out against those who returned to Cuba. App. at 66a-67a.

In Haiti, by contrast, the danger of retaliation against repatriated refugees remains all too real. The statements of the Government's own personnel, as well as the Government's own evidence, establish that politically motivated violence against Aristide supporters continues in Haiti, notwithstanding the high-level and hard-won governmental changes that have only recently occurred there. Gregg Beyer, Director of the INS's Asylum Division, advised his agency's asylum adjudicators in an instructional memorandum that:

> the structures that supported and effected the September, 1991 military coup are still present, if currently under wraps. Those elements involved in controversial past practices include but are not limited to, the small wealthy elite, the military, the police, the section chiefs, the attaches (heirs to the tontons macoutes) the Front for the Advancement and Progress of Haiti ("FRAPH"), and other paramilitary structures.

App. at 41a.

In stark contrast to the Government's optimistic courtroom portrait of conditions in Haiti, the Beyer operational memorandum candidly discusses the continued "accounts of ongoing violations and killings," even after President Aristide's return to power, *id.*, and that individuals and groups that have been guilty of past human rights violations in Haiti "have simply and probably only temporarily retreated into the background." App. at 41a-42a. Corroborating Mr. Beyer's concerns, Brunson McKinley, Deputy Assistant Secretary of State for Population, Migration, and Refugees, stated in his deposition that he has knowledge of ongoing political violence in Haiti against supporters of Aristide and democracy.[6] App. at 59a. Secretary

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[6] Still another official, Kenneth Leutbecker, a Justice Department Community Relations official with responsibility for humanitarian assistance to Guantanamo, opposed the release of names of the Haitians (prior to the intervention of the Multi-National Force ("MNF") and the return of Aristide) because "of the potential for violence and retaliation which could be directed

McKinley also confirmed that "I have heard that in parts of the countryside there is still trouble and agitation and the possibility of political pressures, persecution."[7] *Id.*

In addition to the Government's own damaging evidence about the dangerous conditions in Haiti, respected human rights organizations and commentators further confirm Haiti's continuing political instability. William O'Neill, Legal Director of the United Nations/Organization of American States International Civilian Mission to Haiti from June 1993 to March 1994, and Consultant to the National Coalition for Haitian Refugees, personally observed the circumstances in Haiti upon the return of President Aristide. Mr. O'Neill testified that "huge obstacles remain" to the return of the rule of law and respect for human rights in Haiti. App. at 48a. Mr. O'Neill also described the presence of the Multi-National Force ("MNF") in rural Haiti as "extremely limited." App. at 50a. Approximately 70 percent of Haitians live in isolated, rural areas and MNF troops have not

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against all Haitians connected with the migrants." App. at 52a. Mr. Leutbecker's assessment did *not* change after the MNF intervened in Haiti.

> Since the original decision was made not to release Haitian migrant names, the issue has been reconsidered several times. . . . Our conclusions concerning the threat of retaliation and concern for the Haitians' safety remains.

Id.

[7] The Government below put emphasis on the affidavit of Michael Skol to support its position that conditions in Haiti had improved so dramatically since the return of President Aristide that Guantanamo refugees can safely return to that country. However, Skol's deposition demonstrated that he cannot speak definitively on these issues. Indeed, Mr. Skol admitted that he was unfamiliar with any specific facts as to the current security conditions in Haiti. App. at 68a-69a. When asked to support with any example his statement that members of the Haitian military with "demonstrably unacceptable human rights reputations are being removed," Skol stated, "I simply don't know." App. at 66a. Indeed, Mr. Skol conceded at deposition that human rights violations in Haiti have not ceased, App. at 65a, and that the multi-national force has not been deployed to all areas of the country. *Id.*

been deployed in the numbers necessary to provide even "minimal security in the countryside."[8] *Id.* Further, the MNF's attitude toward the Haitian military and other paramilitary forces, such as FRAPH, "undermines the effort to create a safe and secure environment which is a necessary prerequisite to insuring respect for human rights."[9] *Id.* It is undisputed that FRAPH operates a repressive and violent force against Aristide supporters. *Id.*

The December 8, 1994 briefing paper of the respected Human Rights Watch/Americas similarly confirmed that human rights violations in Haiti continue.[10] App. at 80a. Haitian military, paramilitary forces (attachés) and FRAPH members have continued to assassinate or beat Aristide supporters subsequent to the deployment of U.S. troops and the MNF. The reason for the continued disturbing human rights situation in Haiti is the failure of the MNF to collect and seize weapons which remain in the hands of the army, FRAPH and other paramilitary forces and military supporters. *Id.* Though the

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[8] Even as of last November, U.S. forces remained in only 27 of the 500 towns and villages that they had claimed to visit. App. at 65a. Petitioner advises this Court that that presence has been reduced even further.

[9] Mr. O'Neill affirms:

> Haitians still on Guantanamo have reason to fear persecution based on their political opinion if forced to return to Haiti. Large parts of the countryside and key urban neighborhoods are under the sway of the Haitian military and paramilitary where the MNF is not present and where the MNF's presence, while benign, remains limited and its mandate restricted.

App. at 50a-51a.

[10] News accounts of continuing violence in Haiti corroborate this perception that that country, in particular outside Port-au-Prince, remains not yet stable or safe. *See, e.g., Beheading Sows Terror In Rural Haiti*, Miami Herald, Nov. 19, 1994, App. at 73a; *Two Slain by Attaches on Aristide's First Full Day Back*, N.Y. Times, Oct. 17, 1994, App. at 76a; *Grenade Kills Five in Haitian Crowd*, Wash. Post, Sept. 30, 1994, App. at 78a.

MNF has detained certain paramilitary agents, "the majority of these appear to have been released without any legal proceedings." *Id.*

This accumulation of reliable reports of ongoing human rights violations in Haiti shows that even the Government's courtroom justifications were either erroneous in fact or legitimately in dispute and that dismissal without a plenary hearing was legal error. Indeed, the Government's ostensible reason for the denial of equal treatment to the Haitian children was shown solely to be a post-hoc rationalization. Living in no less risky a situation than were the paroled Cuban children, the Haitian children continue to face an unstable and dangerous future if repatriated to the country they fled, rather than paroled, for no reason other than their national origin and the color of their skin.

ARGUMENT

I. The Opinion Below Directly Contradicts The Decision Of This Court In *Jean v. Nelson*, Which Ruled That The INA, 8 U.S.C. § 1182(d)(5)(A), Prohibits Discrimination Based On Race Or National Origin.

The opinion of the panel in this case is deserving of review because, in its interpretation of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1503, the panel baldly ignored the decision of this Court in *Jean v. Nelson*, 472 U.S. 846 (1985) ("*Jean II*"), *aff'g* 727 F.2d 957 (11th Cir. 1984) ("*Jean I*"), and rested its opinion on grounds that squarely contradict this Court's *Jean II* holding. This Court in *Jean II* explicitly ruled that § 1182(d)(5)(A) of the INA bars the Government from discrimination on the basis of race or national origin in granting or denying aliens parole into the United States, *Jean II*, 472 U.S. at 855, but the panel below nonetheless reached precisely the opposite holding, without even mentioning that its decision was in direct conflict with this Court's prior holding. This misapplication of binding precedent, moreover, occurs in a case of

inescapable national importance, affecting the liberty and fate of several hundred stranded refugee children in Safe Haven. It also flouts the obligation of the Executive Branch, conceded in *Jean II*, to obey duly-enacted laws and regulations and not to utilize race or national origin factors in decisions under the parole statute and regulations.

The Petitioners in the case at bar squarely challenged the Government's discriminatory exercise of the statutory parole powers awarded to the Attorney General pursuant to the INA. In *Jean II*, this Court ruled explicitly that the INA and its implementing regulations, 8 C.F.R. § 212.5, specifically forbid the Executive Branch from invidiously discriminating on the basis of race or national origin in its parole decisions. "[T]he INS's parole discretion under the statute and these regulations, while exceedingly broad, does not extend to considerations of race or national origin." *Jean II*, 472 U.S. at 855. Circuit courts have also agreed that the Executive may not exercise its power in a manner which gives "effect to considerations which Congress could not have intended to make relevant." *Doherty v. INS*, 908 F.2d 1108, 1117-18 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992); *accord Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982). Indeed, the Government expressly conceded this point at oral argument in *Jean II*, admitting that the parole statute and its implementing regulations make discrimination based on race or national origin impermissible.[11] *Jean II*, 472 U.S. at 872. The Government's litigation stance in the instant case therefore is not only willfully contrary to Su-

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[11] In light of this Court's ruling, and the Government's concession, that § 1182(d)(5)(A) forbids discrimination based on race or national origin, the result under that section is the same as it would be under a section, such as § 1152(a), where the language of the statute itself explicitly bars such discrimination. *See Legal Assistance For Vietnamese Asylum Seekers v. Department of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) (nationality-based discrimination in the granting of immigrant visas held impermissible under 8 U.S.C. § 1152(a)).

preme Court precedent, it also disregards the Government's own admitted statement of the law. The Government's flouting of *Jean II* and refusal to extend parole to the black Haitian children on the same terms as to the white Cubans is indefensible.

In an unprecedented interpretation of Executive power, and in defiance of this Court's holding in *Jean II*, the panel perceived the Government's authority under the INA to grant or deny parole as unbounded, standardless, and essentially unreviewable. According to the panel, "there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility." App. at 22a, citing to *Jean I*. The panel thus incorrectly concluded that the INA permitted the Government forcibly to repatriate the unaccompanied Haitian minors on the basis of their race and national origin, while granting parole to similarly-situated Cuban refugees, since parole in the panel's view may be denied "on grounds that might be suspect in the context of domestic legislation."[12] *Id.*, citing to *Jean I*.

The panel decision inexplicably ignores this Court's opinion in *Jean II* and distorts the *en banc* holding of its own Circuit in *Jean I*. Nowhere does the opinion below mention this Court's recognition in *Jean II* of the strict statutory and regulatory limits on the Executive's discretion to discriminate invidiously in its parole decisions.[13] Nowhere does the panel note that the Gov-

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[12] " '[T]here is little question that the Executive has the power to draw distinctions among aliens based on nationality.'" App. at 22a, citing to *Jean I*.

[13] Perhaps recognizing that its opinion conflicted with this Court's previous ruling, the panel explained in a footnote that this Court's ruling in *Jean II* had dealt with "low-level . . . government officials," whereas in the case below the panel was passing upon "the extensive authority of the Attorney General and the President." App. at 22a. This distinction is plainly insupportable. The prohibition on Government discrimination on the basis of race or national origin does not arise from "superior orders" but rather

ernment itself acknowledged in *Jean II* that discrimination based on race or national origin was impermissible under the parole statute and regulations invoked there and in this case. Likewise, nowhere is it mentioned that the Eleventh Circuit in *Jean I* had reached essentially the same conclusion, ruling as binding Circuit precedent, *en banc,* that the INA and its regulations strictly circumscribed the Executive's parole discretion. Unlike the panel below, the *Jean I* court held that the parole power of the Executive Branch was not standardless or unreviewable; rather, it required that there be "a facially legitimate and bona fide reason for the government's decision to deny parole." *Jean I* at 978. This test, though not as strict as the standard adopted by this Court in *Jean II*, is nonetheless a reviewable standard. By contrast, the panel below applied no test at all. It neglected to address the judgment of the *en banc Jean I* court which had remanded that case to the district judge to determine whether or not the Government's parole power had been exercised properly within the limits of the statute and regulations. Indeed, in affirming the judgment, this Court specifically directed the lower court to determine whether the Government had properly exercised its authority in that case *without* regard to race or national origin. This Court should accept review of this case in order to reverse the ruling of the panel below and enforce its holding in *Jean II*.[14]

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from a duly-enacted statutory and regulatory framework that binds the entire Executive Branch. The Attorney General may not set aside properly-constituted federal regulations restraining the conduct of the INS merely for political expediency. She remains bound by them until they are properly repealed or modified.

[14] Although the panel subsequently went on to discuss the Haitian detainees' rights under this statute, App. at 21a, it first held that the statute was inapplicable here since it had no application "extraterritorially." App. at 18a. This finding of extraterritoriality, however, is based upon the fundamental misconception that Guantanamo is not in any way U.S. territory. For all of the reasons set forth *infra*, a proper interpretation of the facts of this case and of prior precedent indicates that, for purposes of this statute as well as for constitutional purposes, Guantanamo is U.S. territory.

II. The Opinion Below Directly Conflicts With This Court's Prior Interpretation Of The First Amendment And The Equal Protection Clause Of The Constitution.

The panel's opinion is also deserving of review because of its unprecedentedly broad evisceration of several basic constitutional guarantees raising a substantial and recurring question of constitutional law. Indeed, according to the panel's crabbed reading of the Constitution, the federal officials at Guantanamo may act essentially above the law in their treatment of the detained Haitian children since their actions would be completely free of any constitutional restraint or judicial scrutiny. Not since the long-discredited *Dred Scott v. Sandford*, 60 U.S. 393 (1857), has a court ruled so broadly as thus to deny the personhood of an entire class of bereft individuals. The panel stripped away from the detained Haitian children all rights under the First Amendment, and even stretched its ruling further to deny to HRC its First Amendment rights to associate with its clients, the detained Haitian children. The panel also denied to the Haitian children any rights under the equal protection clause of the Fifth Amendment, thereby allowing Government officials to invidiously discriminate against the Haitian children, and in favor of the similarly-situated Cuban refugees, based upon their race and national origin. Because of the disturbingly broad reach of the panel's decision, and the violence that it does to the

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This status of Guantanamo as U.S. territory distinguishes the case at bar from *Sale v. Haitian Ctrs. Council*, ___ U.S. ___, 113 S. Ct. 2549 (1993). In *Sale*, the plaintiffs were interdictees who had been detained by the Coast Guard on the high seas and never brought to any U.S. territory, and those plaintiffs could not claim the protection of the INA, since it was found to be inapplicable extraterritorially. *Id.* at ___, 113 S. Ct. at 2560. Here, there is no problem of extraterritoriality because the Haitian detainees were selectively brought into U.S. jurisdiction at Guantanamo and the exceptional hardship finding supporting the exercise of parole authority was made in Washington, D.C.

deepest of this nation's constitutional principles, it raises substantial questions deserving of review by this Court.

A. The Opinion Below Directly Conflicts With This Court's Settled First Amendment Jurisprudence By Engaging In Content-Based Discrimination In Denying HRC Access To The Haitian Children.

The panel erroneously impinged upon the rights of Petitioner HRC, preventing HRC from exercising its First Amendment right to associate with its members and potential clients among the Haitian children and to advise them regarding their current situation. App. at 25a. The Government's denial of access applies only to HRC and CABA; other groups such as Amnesty International are permitted wide access. As such, the Government officials here violate the settled principle that persons and organizations may not be selectively excluded from a forum based on the political or legal content of their message. The Government, in precluding HRC from meeting with the Haitian children, has barred access only to those whom they determine carry a particular legal and political message, one the Government assumed it would not like -- namely, the giving of legal advice that might fully inform the detainees of their legal rights in Safe Haven and of current conditions in all of Haiti which might affect a voluntary return decision or other course of conduct.

This Court has definitively ruled that such content-based discrimination is impermissible because, even with regard to a non-public forum, any controls over access that the Government imposes must be viewpoint-neutral. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, __ U.S. __, 113 S. Ct. 2141, 2147 (1993). Whatever the authority the Executive may have to regulate speech in a public or non-public forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def.*

& Educ. Fund, 473 U.S. 788, 806 (1985). *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." (citation omitted)).

Nonetheless, the Government undertook a total ban on speech by HRC, a legal/political association seeking to exercise its First Amendment rights to have its attorneys associate with and communicate to individuals held in Safe Haven custody by the Government. The panel's decision leaves in place the Government's heretofore successful efforts selectively to prevent HRC and CABA -- and them alone -- from visiting, meeting with and counseling the detained Haitian children. Indeed, the ramifications of the panel's holding are far-reaching: lawyers representing multinational corporations could be barred from consulting their clients, a non-American citizen charged with a crime on a military base abroad could be held incommunicado and prevented from seeing a lawyer, and a foreign leader kidnapped and detained by U.S. authorities could be cut off from counsel completely. Indeed, under the panel's holding, the Government could lawfully bar American citizens on Guantanamo from writing open letters, criticizing the President, or engaging in religious worship.

To reach its conclusion, the panel below conditioned HRC's exercise of its First Amendment rights upon the existence *vel non* of the Haitian children's underlying legal claims.[15] App. at 25a. As Judge Hatchett noted in dissent in *Haitian*

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[15] In its complete rejection of the Haitian children's rights of access to counsel under the First Amendment, the panel mischaracterized the Haitian children's legal and factual ties to the United States arising from the legal status of Guantanamo and the legal significance of Safe Haven. *See infra*. HRC does not concede that the panel was correct in ruling that the Haitian children do not have First Amendment rights, but even if it is assumed, *arguendo*, that they do not, the panel's rejection of HRC's First Amendment rights is constitutionally flawed.

Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 1245 (1992) ("*HRC II*") the illogic of this reasoning is transparent:

> Even if the clients have no such rights or causes of action, the lawyer is entitled to counsel the client regarding the legal situation and the available options. Instead, in this case, the majority holds that the Haitian refugees have no rights enforceable in American courts and therefore they have no business meeting with lawyers. Thus, the majority deprives these non-English speaking Haitians, unschooled in the American legal system, of lawyers in a situation affecting their most fundamental interest, because of a prior determination that they have no rights that justify meeting with American lawyers. Obviously, such a determination should be made only after they have received the benefit of counsel.

HRC II, 953 F.2d at 1517 (Hatchett, J., dissenting). Those words are all the more true in the case at bar, where the remaining Haitians whose fundamental rights are at stake are underage and thus incapable of competently pursuing those rights themselves.[16] Moreover, the panel's ruling contradicts the prior holding of the Eleventh Circuit *en banc*. In *Jean I*, the *en banc*

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[16] As a feebly attempted justification for its action, the Government complained of the costs associated with granting access to counsel. Yet, as they have been throughout this litigation, and the Court below knew, CABA and HRC stand ready to arrange and pay for their own transportation to meet with the detainees, without any financial or logistical assistance from the Government. While the panel below noted that "assistance is necessarily required in providing access to the base, meeting areas, accommodations and security," App. at 25a, the undisputed fact remains that the Government willingly undertook all of this "assistance" on behalf of Amnesty International and each of the other groups to whom it allowed entry. It was only CABA and HRC, because of the presumed content of their message, that were denied such access.

court recognized that this Court "has repeatedly emphasized that counsel have a first amendment right to inform individuals of their rights." *Jean I*, 727 F.2d at 983 (citing cases). Nowhere in *Jean I* does the *en banc* court condition counsel's rights upon the existence of his client's rights, and for the panel below to do so is improper. Nowhere does the panel seek to explain its rejection of binding *en banc* Circuit precedent involving the very petitioner in this case.

B. The Panel's Decision Violates This Court's Settled Equal Protection Jurisprudence.

The panel's denial of the Haitian children's constitutional rights to equal protection is plainly insupportable. Because of its fundamental nature and potential for recurrence, it raises a substantial question deserving of review. The disparity in the treatment of the detained Haitian children, who face forcible repatriation to a country still seriously threatened by internal political violence, when compared with the similarly situated Cuban refugees, who have been able to obtain parole into the United States on generous terms, is in direct conflict with the non-discrimination principle fundamental to the constitutional values enunciated by this Court. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

Whatever may be the power of Congress or the President to make distinctions pursuant to duly-enacted statutes and regulations in the admission of excludable aliens, this Court has never held that agency and military officials, in this case instructed from Washington, D.C., may invidiously discriminate in granting and denying parole.[17] The decision amounts to a

[17] Even in *Korematsu v. United States*, 323 U.S. 214 (1944), in the midst of a world war, where there was fear of sabotage and the survival of our nation was at stake, this Court did not abandon the non-discrimination principle. Indeed, it subjected the discrimination by the President, which had been sanctioned by Congress, to strict scrutiny. *Id.* at 216. The panel's refusal to subject the Government's discriminatory actions to any scrutiny at all in the absence of a national security threat is thus wholly inexplicable.

broad holding that the Constitution can afford no protection whatsoever to detained aliens subjected as a class to invidious discrimination and that such aliens are, in effect, constitutional non-persons. *Cf. Dred Scott v. Sandford*, 60 U.S. 393 (1857), (black plaintiff's action dismissed; those of his race were ruled not to be "persons" under the Constitution and thus were barred from bringing suit). If not reversed, the panel's decision would constitutionally sanction arbitrary denial of parole by INS officials, based solely upon race, national origin, or religion. Thus, INS enforcement officials may tomorrow deny parole to all Russian Jews simply because they *are* Jewish, or all Bosnian refugees simply because they *are* Bosnian, just as in this case where parole was denied to the detained Haitian children simply because they were black or from Haiti. Such an unprecedented distortion of this nation's constitutional values should not be allowed to escape review by this Court.[18]

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[18] The Government's courtroom justification for its unequal treatment of the Haitian children was by advocating that political conditions in Haiti are in some way better than in Cuba. As Petitioner's factual statement sets forth, however, this illusory rationale, unsupported in fact in the record and untested at a plenary hearing, is nothing more than a post-hoc rationalization for forensic purposes. As this Court has previously made clear, such a justification should have been disregarded below. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

When the Attorney General granted parole to the Cuban minors (and left the Haitian children behind), the stated reason for this action was the "extraordinary hardship" of the detention camps. App. at 39a. The political differences between Haiti and Cuba that the Government in its court statements apparently finds so important were nowhere mentioned or recorded in respect of the INS decisions at issue, and formed no basis for the decision. That rationale was only adopted long *after* the discriminatory denial of parole to the Haitian children had been carried out, and only as a strategy for this litigation. Moreover, as is also set forth in Petitioner's factual statement, evidence from respected commentators and the Government itself demonstrates that political violence remains a very real threat in Haiti, despite the Government's rosy courtroom pronouncements.

The panel's sweeping denial of all constitutional rights to the detained Haitian children arises from a fundamental error. In spite of contrary persuasive precedent from this Court and other federal appellate courts, the panel ruled erroneously that the Haitian children in Safe Haven could raise no constitutional claims on the grounds that the United States military installation maintained in perpetuity at Guantanamo Bay is outside the reach of the Constitution. App. at 16a. It reached this conclusion despite its own finding that Guantanamo is held under the "complete control and jurisdiction" of the United States,[19] *id.*, and despite the uncontroverted fact that American law governs the conduct of those on the base, App. at 53a, and that the parole decisions were made in the United States, App. at 4a, 39a. By making the scope of the Constitution so dependent upon formalities, while ignoring all of the indicia of United States nexus and control, the panel opinion demeans precedent and fundamental principles of American law. "[T]here has never been a time when United States authorities exercised governmental powers in any geographical area . . . without regard for their own Constitution. (citation omitted). Nor has there ever been a case in which constitutional officers . . . have exercised the powers of their office without constitutional limitations." *United States v. Tiede*, 86 F.R.D. 227, 242 (U.S. Ct. for Berlin 1979).

The Second Circuit has previously addressed the issue of the status of Guantanamo, and it directly reached a conclusion opposite to that of the panel below. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992) ("*McNary*"), *vacated as moot on other grounds sub nom. Sale v. Haitian Ctrs. Council*, ___ U.S. ___, 113 S. Ct. 2549 (1993). The *McNary* court held that, because of the complete U.S. control and jurisdiction over the base, Guantanamo was within the ambit of the

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[19] The naval base at Guantanamo Bay is entirely closed off from the rest of Cuba. The perimeter of the base is ringed with minefields and concertina wire to prevent any unauthorized entry onto this U.S.-controlled territory. App. at 4a, 58a.

Constitution. The United States officials thus were barred in that case from arbitrarily violating the due process rights of the detained Haitian refugees as found there. While the *McNary* opinion was subsequently vacated by this Court on unrelated mootness grounds, and clearly did not bind the panel below, its unrefuted reasoning remains in unresolved conflict with the decision of the panel below and the issue is certworthy in this Court.

The panel's opinion below also runs counter to the principles in the *Insular Cases* where this Court stated that "[t]he limitations . . . to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution." *Dorr v. United States*, 195 U.S. 138, 142 (1904). Thus, it is the substance of the United States' relation to Guantanamo, and the power that it exercises there, that should inform the extent to which the protections of the Constitution apply to those the Government has accorded Safe Haven.

Relying upon the principles of the *Insular Cases*, other courts have repeatedly held that fundamental constitutional rights, which include the First and Fifth Amendments, apply to non-citizens of the United States in territories where, as here, the United States lacks formal sovereignty but has full jurisdiction and control. In the Panama Canal Zone, the U.S was granted by treaty "in perpetuity the use, occupation, and control" of the land, without a formal transfer of sovereignty. Isthmian Canal Convention of 1903, T.S. No. 431, Arts. II and III. Courts treated the area as an unincorporated territory of the United States, which meant that fundamental rights of due process applied to protect even non-citizens. *See, e.g., Jimenez v. The Tuna Vessel "Granada,"* 652 F.2d 415 (5th Cir. 1981) (district court held to have impermissibly denied due process to defendant). The same result was reached with regard to the Trust

Territory of the Pacific Islands. In *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977) (noting that, pursuant to the *Insular Cases*, the locality of the plaintiff, not his nationality, determined the extent of his rights). Finally, it was similarly settled that, in the American sector of Berlin, fundamental constitutional rights extended to non-citizens, even though the United States was an occupying power and not a sovereign. *Tiede*, 86 F.R.D. at 242-43.

Moreover, notwithstanding the panel's ruling, prior practice has consistently extended constitutional protection even to aliens at Guantanamo. For instance, the former Court of Claims assumed that the takings clause of the Fifth Amendment applied to a Cuban contractor at Guantanamo. *Huerta v. United States*, 548 F.2d 343 (Ct. Cl.), *cert. denied*, 434 U.S. 828 (1977). Also, the United States exercised criminal jurisdiction over both citizens and aliens at Guantanamo, to the exclusion of Cuban law.[20] *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (Jamaican national); *United States v. Rogers*, 388 F. Supp. 298 (E.D. Va. 1975) (U.S. citizen). These cases warrant this Court's acceptance of this case for plenary review in order to correct the panel's misreading of the fundamental constitutional protections to be accorded those in Safe Haven and the constitutional limits on Governmental action affecting those in Safe Haven on Guantanamo.

Furthermore, and quite independently, the Haitian children detained in Guantanamo are entitled to constitutional protection because the United States itself selected them for a grant of Safe Haven status in allowing them entry into the protection of the United States at Guantanamo. As this Court has recognized, an

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[20] Indeed, prior to the Government's mass repatriation of the Haitian adult refugees "voluntarily," at least one Haitian reportedly was charged with a criminal assault upon another refugee and was taken, consistent with statutory law, to the mainland United States for prosecution pursuant to American law. App. at 53a.

alien's entitlement to constitutional protection rises in accordance with his connection to this country. *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950). The Government admits that Safe Haven status, which is reserved for eligible persons fleeing repressive regimes, is not automatic and that eligibility criteria had to be satisfied. Haitian refugees who were intercepted on the high seas by the United States military were questioned to determine if they were eligible for Safe Haven status. Only those who met the necessary criteria were officially granted Safe Haven status at Guantanamo. This eligibility or "weeding" process is essentially the same as the "screening-in" process at issue in *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) ("*HCC*").[21] There, the plaintiffs were Haitians at Guantanamo who had been interdicted, interviewed by the INS and found to have a "credible fear of return." That court held that

> it would not be "incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States." Nor would it be either "impracticable" or "anomalous" to apply the Due Process Clause to screened-in Haitians held in U.S. custody on Guantanamo.

Id. at 1042 (quoting *McNary*, 969 F.2d at 1343).

The panel below erred in dismissing Safe Haven as a merely "gratuitous humanitarian act." App. at 20a. Rather, Safe

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[21] Because the Haitian children here have been "screened-in" and granted Safe Haven status, the panel's comparison of this case to *HRC II* is inapposite. *See* App. at 24a. There, the Coast Guard interdicted Haitian refugee vessels on the high seas and, after some questioning of the refugees, repatriated them without affording the refugees the opportunity to apply for any refugee, asylum, or Safe Haven status. *HRC II*, 953 F.2d at 1501-02. *HRC II*, therefore, dealt with aliens who had been "screened out."

Haven is a status which is well-established in international law. *See, e.g.*, Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 Va. J. Int'l L. 551, 624 (1986); U.N. Sec. Council Res. 819, U.N. SCOR, 48th Sess. 3199th mtg. at 2 para. 1, U.N. Doc S/Res/819 (1993) (establishing Bosnian safe areas). A senior State Department official responsible for all migration and refugee affairs acknowledged in his deposition in this case that " 'Safe Haven' is a term of art" and that it is defined through accepted standards of international law and human rights. Other Government officials admitted that the Haitians granted Safe Haven status are guaranteed protection for so long as they wish to remain. App. at 60a. Furthermore, the Government's own witnesses concede that Safe Haven status requires "*equal protection* to all comers who want it. That is what Safe Haven is." App. at 59a (emphasis added). Notably, Government officials responsible for formulating and implementing the Safe Haven policy have admitted in this case that the Safe Haven afforded to the Haitians is intended to be equivalent in all respects to the Safe Haven afforded to the Cuban refugees. App. at 53a.

Having granted Safe Haven status to the Haitian refugees at Guantanamo, the United States has granted them a liberty and property interest which should not be taken from them or diminished by invidiously discriminatory action. "If the [Fifth Amendment] does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin." *HCC*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (finding screened-in refugees have due process rights under Fifth Amendment). By its affirmative commitment of providing Safe Haven, the Government owes a measure of duty to those in its care.[22]

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[22] Certainly in other contexts, the Government, by its affirmative conduct, has created rights where none otherwise existed, and these rights are not treated as "gratuitous humanitarian acts." *See, e.g., Board of Regents v.*

C. The Panel's Refusal To Compel The Government To Disclose The Names Of The Haitian Refugees Conflicts With This Court's Settled Equal Protection And First Amendment Jurisprudence

The panel's opinion further erred in holding that, because the detained Haitian children have been found to have no constitutional rights, they cannot claim that the Government's refusal to disclose their names, while making public the names of the similarly-situated Cuban refugees, is a violation of equal protection. App. at 1430. The flaws underlying this holding have been described above in Petitioner's argument that the protections of the Constitution should be held to be available to the Haitian children in Guantanamo. As a further error, however, the panel's decision fails to recognize that the decision to disclose the names of the Cubans, and the refusal to disclose the names of the Haitians, both took place physically within the United States. App. at 4a, 39a. There is nothing extraterritorial about these acts and this blatant discrimination. *Cf. Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1531 (D.C. Cir. 1984).

In upholding the Government's refusal to disclose the Haitian children's names, the panel also invoked First Amendment case law for the proposition that there is no right to information held by the Government. App. at 27a. This statement is overly simplified, and largely incorrect. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972) (the First Amendment protects

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Roth, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Moreover, equal protection analysis applies to limit governmental discretion even in the absence of a fundamental right. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide [appellate review]. But that is not to say that a State that *does* grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.") (citations omitted); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (applying equal protection analysis to state education financing scheme, while declining to hold that there is a fundamental, constitutionally protected right to education).

a right to "receive information and ideas"). Where there is a willing speaker, there is a right to hear that speaker. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976). Several detainees have expressed a willingness to communicate. In isolating the other detainees and preventing any determination of their willingness to speak, the Government is not merely failing to come forward with information, it is blocking the free flow of information. *Cf. Procunier v. Martinez*, 416 U.S. 396 (1974) (preventing the censorship of outgoing prisoner mail as violative of the First Amendment rights of those receiving it). The panel's rejection of the rights of the Haitian children to have their names disclosed thus constitutes still another violation of constitutional principles established by this Court, requiring review and reversal.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners ask that the writ be granted.

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Appendix A

United States Court of Appeals,
For The Eleventh Circuit.

Nos. 94-5138, 94-5231, and 94-5234.

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors-Appellees,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants-Appellants.

Jan. 18, 1995.

Before KRAVITCH, BIRCH, and CARNES, Circuit Judges.
BIRCH, Circuit Judge:

This case requires us to address the following issues: (1) whether Cuban and Haitian migrants temporarily provided safe haven at the United States naval base at Guantanamo Bay, Cuba, and at the United States military installations in Panama, may assert rights under the Immigration and Nationality Act, the 1951 United Nations Convention Relating to the Status of Refugees, the Cuban Adjustment Act, the Cuban Democracy Act and the Constitution of the United States; (2) whether legal organizations can sustain First Amendment claims of freedom of speech and association with these migrants; and (3) whether the First Amendment or the Equal Protection clause of the Fifth Amendment dictates that the United States government must furnish a list of Haitian migrants who are residing at Guantanamo Bay to the Haitian Refugee Center, a legal service organization. The district court has entered preliminary injunctions granting attorneys for the Cuban migrants access to all Cuban migrants provided safe haven prior to voluntary repatria-

tion and attorneys for Haitian migrants access to their clients and any other Haitian migrants who request counsel in writing, barring the government from repatriating any Cuban migrants prior to the migrant's consultation with a lawyer, directing the United States Attorney General to parole unaccompanied minor Haitian migrants into the United States on the same terms that unaccompanied minor Cuban migrants have been or may be paroled, and requiring the government to release the names of all Haitian migrants to the Haitian Refugee Center. After thorough review of authority in this circuit and the Supreme Court, we VACATE the district court's order and REMAND to the district court with direction to dismiss the plaintiffs' claims.

I. BACKGROUND

A. Factual Background

1. *Cuban Migration*

On August 8, 1994, Fidel Castro announced that the Cuban government would no longer forcibly prevent emigration from Cuba by boat. Castro's new policy encouraged thousands of Cubans to board makeshift rafts and boats to escape Cuba and head for the shores of the United States. While many were lost at sea, approximately 8000 Cubans arrived in the United States safely. In an effort to quell this influx of migrants and to save the rafters' lives, on August 19, 1994, the President of the United States ordered the United States Coast Guard to intercept watercraft carrying persons fleeing from Cuba and bound for the United States' border and to transport these persons to the American naval base at Guantanamo Bay, Cuba. The United States leases its military base at Guantanamo Bay from sovereign Cuba under a lease agreement negotiated in 1903.[1]

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[1] The Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418, reprinted in, 6 Bevans 1113-15 [hereinafter Lease Agreement], provides that the United States has "control and jurisdiction" over the leased land, but that Cuba retains sovereignty over the land. The lease states in pertinent part:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased] areas of land and water, on the other hand the Republic of Cuba

In August, 1994, the United States government began negotiating with the Cuban government to halt the flow of migrants to the United States. These diplomatic negotiations culminated on September 9, 1994, in an accord with the Cuban government. In this accord, the United States agreed it would allow Cuban migrants to enter the United States only by applying for immigrant visas or refugee admittance at the United States Interests Section in Havana, Cuba. A minimum of 20,000 persons are to be allowed to migrate legally to the United States each year, not including immediate relatives of United States citizens who are under no numerical restrictions. However, in conjunction with this international agreement, the Attorney General also ordered that no Cuban who had accepted safe haven in Guantanamo Bay or Panama would be allowed to apply for a visa or for asylum in the United States from safe haven.[2]

Currently, Cuban migrants have three options with respect to their residence: (1) they may remain in safe haven; (2) they may repatriate to sovereign Cuba voluntarily; or (3) they may travel to a third country willing to accept them. While more than 1000 Cubans have requested voluntarily to be returned to Cuba, the Cuban government has restricted the return of Cuban nationals and has delayed the voluntary repatriation process. Persons who repatriate to Cuba voluntarily may then apply for asylum through the regular channels commencing at the United States Special Interests Section in Havana, Cuba.

The United States government's expressed desire is not to maintain these migrants for an indefinite period of time or against their will. The government's position is that it could return the migrants to Cuba legally without a migrant's request.

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consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas... Lease Agreement, art. III.

[2] According to Michael Skol, Principal Deputy Assistant Secretary of State for Inter-American Affairs at the Department of State, this policy was implemented "to deter further dangerous migration from Cuba, and to provide Cubans seeking entry into the United States a safe alternative to boat departures." Skol Decl. ¶ 9.

However, the government has offered the Cuban migrants safe haven for as long as the migrants wished. All Cuban migrants volunteering to repatriate execute a form approved by the United Nations High Commissioner for Refugees ("UNHCR") and meet with a representative from UNHCR before returning.

UNHCR is an agency of the United Nations specializing in the care and well-being of refugees worldwide. UNHCR was established by the United Nations general assembly on January 1, 1951, "to provide international protection to refugees and to seek permanent solutions for their problems." UNHCR, Handbook for Emergencies § 2.2(1) (1982). The UNHCR "aim[s] ... to secure treatment in accordance with universally recognized humanitarian principles not directly linked to the status [as refugees] of those in need." *Id.* § 2.1(4); *see also id.* § 2.2(1). UNHCR has participated with the United States government in ensuring that any return to Cuba was made on a voluntary basis.

In addition to UNHCR, humanitarian groups such as Amnesty International, Inc., the U.S. Committee for Refugees, and Church World Service (Immigration and Refugee Service) as well as legal organizations such as the Ad Hoc group of Cuban-American Attorneys, have been allowed to visit the migrants at the base. However, as the numbers of migrants and the length of the stay in safe haven have increased, problems have erupted. Many Cuban migrants have climbed over barbed wire and jumped from treacherous cliffs into the bay in attempts to swim the mile or so back to sovereign Cuba. Still others have scaled fences and braved a mine field in order to reach their homeland. During early December, 1994, many were injured during riots at the camps, particularly in Panama. The risk of violence and danger, both to the migrants and to the military personnel charged with their care, has grown. While the United States has begun negotiating with other countries to accept migrants from safe haven and has continued with the voluntary repatriation program, problems continue. Since consummation of the accord, the Attorney General has exercised her discretion to parole into the United States Cuban migrants who have sponsors in the United States and are (1) over the age of 70; (2) who are ill; or

(3) who are unaccompanied minors (under the age of 13). She has also begun to consider, on a case-by-case basis, the possible parole of other Cuban children at Guantanamo Bay who are accompanied, but who may suffer severe hardship if they remain in safe haven. Over 20,000 Cubans currently remain in safe haven at Guantanamo Bay[3] and at military installations in Panama.

2. *Haitian Migration*

In 1991, Haiti's elected leader, Jean-Bertrand Aristide, was ousted from power. As a result, thousands of Haitians departed Haiti and attempted to reach the United States. Between May, 1992, and June, 1994, the United States Coast Guard interdicted on the high seas Haitians bound for the United States and returned them directly to Haiti. In June, 1994, the government began processing some migrants for asylum in the United States. However, in July, 1994, the United States began offering safe haven at Guantanamo Bay to the migrant Haitians; the government was not allowing the Haitian migrants to enter the United States, but was not returning them directly to Haiti. At the peak of emigration in 1994, over 16,800 Haitian migrants were housed at Guantanamo Bay.[4]

On September 19, 1994, the United States led a United Nations-authorized military intervention in Haiti. Through these efforts, Haitian President Jean-Bertrand Aristide was returned to power on October 15, 1994. After his reinstallation, an ever-increasing number of Haitians in safe haven have volunteered to repatriate. Approximately 8000 Haitians remained at Guantanamo Bay on December 19, 1994.

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[3] The base at Guatanamo Bay is divided up into various camps housing families, single men, single women and unaccompanied children. There are two special camps, Camps November I and II, where migrants who have voluntarily requested to be repatriated are housed for their safety.

[4] Haitian migrants are being housed only at Guantanamo Bay; no Haitians are in safe haven in Panama. The camp divisions are similar to those maintained for Cuban migrants; however, there are no special camps for those migrants who have requested repatriation.

B. Procedural Background

1. *The Cuban Migrants' Case*

On October 23, 1994, plaintiffs-appellees, Cuban American Bar Association, Inc., Cuban Legal Alliance, Inc., and Due Process, Inc. (collectively "Cuban Legal Organizations"), some Cuban individuals being held on Guantanamo Bay, and some individuals with family members being held on Guantanamo Bay (collectively "individual Cuban plaintiffs") filed a class action complaint requesting declaratory and injunctive relief under, inter alia, the First and Fifth Amendments, 8 U.S.C. § 1253(h), 8 U.S.C. § 1158(a), and Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, [hereinafter the Refugee Convention].[5] Specifically, the Cuban Legal Organizations and the individual Cuban plaintiffs requested that the district court enter an injunction preventing the defendants-appellants ("the government") from denying the Cuban Legal Organizations reasonable access to and communication with their Guantanamo Bay clients for legal consultation relative to the Cuban migrants' putative rights regarding asylum petitions and parole decisions. The Cuban Legal Organizations and the individual Cuban plaintiffs also sought an injunction prohibiting the government from "encouraging or coercing, directly or indirectly, the repatriation to Cuba of, and repatriating, any [Cuban migrant] currently being detained by the United States Government." Class Action Compl. at 59, *Cuban Am. Bar Ass'n v. Christopher*, No. 94-2183 (S.D. Fla. Oct. 24, 1994) [hereinafter *CABA I*].

On October 25, 1994, upon learning that at 11:30 a.m. that day the government would return to Cuba, by plane, twenty-

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[5] The United States acceded to the United Nation Protocol Relating to the Status of Refugees on November 6, 1968. The Protocol bound the United States to comply with Articles 2 through 34 of the Refugee Convention. Protocol Relating to the Status of Refugees, opened for accession, Jan. 31, 1967, art. I, § 1, 19 U.S.T. 6223. The United States agreed to the Protocol with the following reservation, "[a]s to any such provision, the United States will accord to refugees lawfully staying in its territory treatment no less favorable than is accorded aliens generally in the same circumstances." 19 U.S.T. at 6257.

three Cuban migrants who had previously volunteered for repatriation, the Cuban Legal Organizations and the individual Cuban plaintiffs filed an emergency motion for a temporary restraining order and request for an emergency hearing to block the repatriation. Approximately one minute before the plane was to take off, the district court verbally ordered the government to halt the repatriation of these migrants. The district court further considered the arguments of the parties, and on October 31, 1994, the court granted the Cuban Legal Organizations' and the individual Cuban plaintiffs' motion for an emergency "temporary restraining order." Order Granting Plaintiffs' Emergency Mot. for T.R.O., *CABA I*, (Oct. 31, 1994) [hereinafter October 31 Order]. The district court specifically granted the Cuban Legal Organizations and the individual Cuban plaintiffs the following relief:

> (a) [The government] shall refrain from denying [Cuban Legal Organizations] and other counsel reasonable and meaningful access to the [Cuban migrants in safe haven]; and
>
> (b) [The government] shall refrain from repatriating any [Cuban migrants in safe haven], including those twenty-three (23) persons who were the subject of the temporary restraining Order entered October 25, 1994, without permitting them access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation.

Id. at 13 (emphasis added). The October 31 Order was put into effect "until further order of the court." *Id.*

On November 1, 1994, the government filed a notice of appeal and a motion requesting the district court to stay its own order. The district court failed to grant this request and the government, on November 2, 1994, pursuant to 28 U.S.C. § 1292(a)(1), filed a motion for summary reversal, or in the alternative, for an emergency stay pending appeal in this court. On November 3, 1994, we granted that request in part, staying that portion of the district court's October 31 Order which

prevented repatriation of Cuban migrants who had requested in writing to be returned. Cuban Am. Bar Ass'n v. Christopher, No. 94-5138 (11th Cir. Nov. 3, 1994) [hereinafter *CABA II*] [hereinafter November 3 Order]. On November 4, 1994, we heard oral argument on an expedited basis and that day modified our November 3 Order verbally. We entered a written order on November 7, 1994, confirming our verbal order. *CABA II*, (Nov. 7, 1994) [hereinafter November 7 Order]. We granted the government's motion in part and denied it in part. Specifically, we instructed the government to allow the Cuban Legal Organizations reasonable access to their clients and to any other Cuban migrants who, in writing, requested legal counsel. We also stayed that portion of the district court's order that prevented the government from arranging repatriation of Cuban migrants in Camp November, who "expressed a desire by written declaration to be returned to sovereign Cuba"; however, we barred the government from repatriating any Cuban migrant who did not "express, by written declaration, a desire to be returned to sovereign Cuba." November 7 Order at 2. After our November 7 Order but prior to oral argument over 241 Cubans were repatriated.

2. *The Haitian Migrants' Case*

On October 31, 1994, the Haitian Refugee Center ("HRC") and some individual Haitian migrants at Guantanamo Bay filed a motion to intervene and a motion for temporary restraining order. HRC requested a temporary restraining order instructing the government to afford HRC access to all Haitian migrants at Guantanamo Bay, barring the government from denying parole to unaccompanied Haitian minors, and ordering the disclosure of the identities of all Haitian migrants in safe haven.

The district court issued two orders granting in part the relief HRC requested in its original motion for a temporary restraining order.[6] The district court issued its preliminary

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[6] Prior to the district court's ruling on the original motion for a temporary restraining order, on November 1, 1994, the district court heard an oral motion by HRC for a temporary restraining order blocking the government from repatriating 14 Haitians at Guantanamo Bay who were scheduled for imminent repatriation. The government agreed to delay repatriation until

order on November 22, 1994, granting HRC access to named plaintiffs and any other Haitian migrants who requested counsel in writing, ordering the Attorney General to parole from safe haven unaccompanied Haitian minors in the same manner as unaccompanied Cuban minors, and directing the government to release the names of all Haitian migrants to HRC. Order on Provisional Intervenors' Mot. for T.R.O., *CABA I* (Nov. 22, 1994) [hereinafter November 22 Order]. Upon the government's motion, the district court granted a stay of the November 22 Order as it applied to parole of the minor Haitians and the release of the names of migrants, but continued in force the order allowing HRC access to detained Haitians who requested legal counsel. Omnibus Order, *CABA I* (Nov. 28, 1994) [hereinafter November 28 Order].

Appeals from these orders were filed and on December 1, 1994, the cases filed by the Cuban Legal Organizations and the individual Cuban plaintiffs (No. 94-5138) and HRC and the individual Haitian migrants (Nos. 94-5231 and 94-5234) were consolidated for consideration by this court. On December 19, 1994, after oral argument on the issues presented, we dissolved our November 7 Order and stayed all the relief granted by the district court in its October 31 Order, November 22 Order and November 28 Order. Furthermore, by our December 19 Order, we stayed all further proceedings in the district court, including discovery.

November 3, 1994. The government was planning to repatriate a total of 54 Haitians; 40 of those were returning to seek medical attention and the remaining 14 were the subject of the district court's order. The day after oral argument, November 2, 1994, the district court provisionally granted the HRC's motion to intervene and entered a temporary restraining order preventing the government's scheduled repatriation of the fourteen Haitians. Corrected Order on Mot. to Intervene and Mot. for T.R.O., *CABA I* (Nov. 2, 1994). HRC then requested that the district court bar the government from repatriating Haitians who were scheduled to return to Haiti on November 20, 1994. On November 18, the district court ordered that repatriation could occur as planned under the condition that all Haitians repatriated had requested repatriation in writing. Order on Haitian Refugee Ctr.'s Emergency Mot. for T.R.O. and Request for Emergency Hr'g, *CABA I* (Nov. 18, 1994). That repatriation took place as scheduled.

3. *Issues on Appeal*

We now consider the following issues on appeal:

1. Whether the Cuban or Haitian migrants in safe haven outside the physical borders of the United States have any cognizable statutory or constitutional rights.
2. Whether the Cuban Legal Organizations or HRC have a First Amendment right to associate with migrants held in safe haven outside the physical borders of the United States for the purposes of engaging in political speech, and if so, whether the government engages in impermissible viewpoint discrimination violative of any First Amendment rights of the individual migrants or the Cuban Legal Organizations or HRC by restricting the legal organizations' access to the migrants for the purposes of legal consultation.
3. Whether the government must disclose to HRC the names of all Haitian migrants in safe haven.

II. DISCUSSION

A. *Jurisdiction*

1. *Appealability of Temporary Restraining Orders*

While temporary restraining orders are not generally subject to appellate review, *Haitian Refugee Ctr., Inc. v. Baker*, 950 F.2d 685, 686 (11th Cir.1991) [hereinafter *"HRC I "*]; *McDougald v. Jenson*, 786 F.2d 1465, 1472 (11th Cir.), *cert. denied*, 479 U.S. 860, 107 S.Ct. 207, 93 L.Ed.2d 137 (1986), "where the order has the effect of a preliminary injunction this court has jurisdiction to review the order and is not bound by the district court's designation of the order." *HRC I*, 950 F.2d at 686. To determine whether an order denominated as a temporary restraining order is actually a preliminary injunction, we review the duration of the order; "whether it was issued after notice and a hearing"; the extent of evidence submitted to the district court; and the continuing safeguards installed by the district court. *McDougald*, 786 F.2d at 1472. After review of the district court's orders, we conclude that they are in fact appealable

preliminary injunctions. See November 3 Order. With respect to the district court's October 31 Order, the court explicitly referred to the order as "preliminary injunctive relief." October 31 Order at 4. Moreover, the order is of indefinite duration; it was issued after notice and a hearing; the court received evidence and considered declarations from both parties (commenting that no further factual development need be made before ruling); and the court required the parties to report jointly to it every thirty days regarding the status under its order. We conclude that the characteristics of this October 31 Order belie the district court's label as a temporary restraining order; it is in all respects an appealable preliminary injunction.[7] Thus, pursuant to 28 U.S.C. § 1292(a)(1), we have jurisdiction over an appeal from that order.

With respect to the district court's November 22 Order and November 28 Order granting HRC and the individual Haitian parties relief, but staying portions of that relief during appeal, the district court specifically stated that "pursuant to 28 U.S.C. § 1292(b), the court finds that this Order involves controlling questions of law regarding the rights of [migrants] in Guantanamo Bay which are subject to a difference of opinion and that an immediate appeal may advance the ultimate termination of this case." November 22 Order at 2. On December 1, 1994, we exercised our discretion and permitted appeal from these orders, and accordingly, we take jurisdiction of this appeal under 28 U.S.C. § 1292(b).

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[7] In *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974), the Supreme Court observed:

> A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. *Id.* at 86-87, 94 S.Ct. at 951. Such is the case here.

2. *Standing*

In its appeal to this court for emergency relief from the district court's October 31 order, the government raised a question regarding the standing of the Cuban Legal Organizations and the individual Cuban plaintiffs relative to the putative injuries to parties not before the court, specifically all those migrants who expressed a written desire to be repatriated. Appellants' Mot. for Summ. Reversal, or, in the Alternative for An Emergency Stay Pending Appeal (or a Writ of Mandamus), *CABA II*, at 22 n. 65 (filed Nov. 2, 1994). These migrants were prevented from returning to Cuba by the district court's oral order on October 25, 1994, and by the October 31 Order. After our November 7 Order, repatriation of those who had expressed in writing a desire to return to sovereign Cuba was continued as arranged with the Cuban government. Appellant's Brief at 6 n. 2. But for our stay, the remaining Cuban migrants in Camp November who had requested to be returned to Cuba would be affected by the district court's order barring their repatriation.

The principle of standing is "derive[d] from the Article III limits on the jurisdiction of federal courts." *Jackson v. Okaloosa County*, 21 F.3d 1531, 1536 (11th Cir.1994).

> Before rendering a decision ... every federal court operates under an independent obligation to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based; and this obligation on the court to examine its own jurisdiction continues at each stage of the proceedings, even if no party raises the jurisdictional issue and both parties are prepared to concede it.

Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 759 (11th Cir.1991). We recognize two components to the standing doctrine: the minimum constitutional requirements of Article III and the prudential considerations of judicial self-government. *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 641, 130 L.Ed.2d 546 (1994); *F.D.I.C. v. Morley*, 867

F.2d 1381, 1386 (11th Cir.), *cert. denied*, 493 U.S. 819, 110 S.Ct. 75, 107 L.Ed.2d 41 (1989). To meet the irreducible minimum constitutional requirements, the plaintiff must show "(1) that he has suffered an actual or threatened injury, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable ruling." *Harris*, 20 F.3d at 1121; *accord Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); *Jackson*, 21 F.3d at 1537; *Morley*, 867 F.2d at 1386. The party must also show that prudential considerations do not weigh against consideration of the claims. Harris, 20 F.3d at 1121; *Morley*, 867 F.2d at 1386. We have identified three particular situations in which we will decline to address a party's claim for prudential reasons: "(1) assertion of a third party's [putative] rights rather than individual legal rights; (2) allegation of a generalized grievance rather than an injury peculiar to such litigant; or (3) assertion of an injury outside the statute's or constitutional provision's zone of interests." *Morley*, 867 F.2d at 1386.

For each claim stated in a complaint, there must be a plaintiff who will achieve some redress by the court's actions. *Jackson*, 21 F.3d at 1536. As of this interlocutory appeal, the classes sought have not been certified; neither the Cuban Legal Organizations nor the individual Cuban plaintiffs represent the approximate 1000 Cuban residents of Camp November who expressed their desire in writing to be returned to sovereign Cuba as soon as possible. "Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue." *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981); *accord Church v. City of Huntsville*, 30 F.3d 1332, 1340 (11th Cir.1994) ("[U]nless ... one of the named plaintiffs is in real and immediate danger of being personally injured ... the plaintiff class lacks standing...."); *Jones v. Firestone Tire and Rubber Co.*, 977 F.2d 527, 531 (11th Cir.1992) (holding

that a party may only represent a class to "the extent that he has standing to bring individual claims"), *cert. denied*, — U.S. —, 113 S.Ct. 2932, 124 L.Ed.2d 682 (1993). We conclude that the plaintiffs in this case are not suffering any real or threatened injury by the repatriation of any migrant who has expressed, in writing, his or her desire to be returned to sovereign Cuba. None of the individual Cuban plaintiffs claims to have requested repatriation. Therefore, all of the individual Cuban plaintiffs are outside the group who is being affected directly by the district court's October 31 Order barring repatriation without prior consultation with a lawyer. However, the individual Cuban migrants may properly challenge the United States' repatriation policies to the extent that they allege that they may suffer imminent injury by being coerced in the future into signing declarations of desire to repatriate or being wrongly repatriated to sovereign Cuba, whether or not they may succeed on the merits of those claims. *See Morley*, 867 F.2d at 1387 (holding that standing is determined without considering the party's likelihood of ultimately succeeding on the merits of their claims).

B. *Standard of Review*

"Ordinarily, the grant of a preliminary injunction is reviewed for abuse of discretion; however, if the trial court misapplies the law we will review and correct the error without deference to that court's determination." *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir.1991) (per curiam) [hereinafter "*Baker*"], *cert. denied*, — U.S. —, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992). As discussed below, the district court misapplied the law governing the issues presented in this case. Thus, we accord no deference to the district court's determinations in granting the preliminary injunctions in this case.

C. *The Merits*

A preliminary injunction is extraordinary relief. *Church*, 30 F.3d at 1342. Because of the nature of a preliminary injunction, before relief can be granted, the party requesting the injunction must show: "(1) a substantial likelihood of success

on the merits; (2) a substantial threat of irreparable injury; (3) its own injury outweighs the injury to the nonmovant; and (4) the injunction would not disserve the public interest." *Baker*, 949 F.2d at 1110 (emphasis added); *accord Church*, 30 F.3d at 1342. The district court misapplied the law in this case; thus, we accord no deference to the court's decision.[8] Under the precedent of this circuit and the Supreme Court,[9] we conclude that the Cuban Legal Organizations, HRC, the individual Cuban plaintiffs and the individual Haitian migrants cannot meet the first prerequisite to the grant of a preliminary injunction, a showing of "substantial likelihood of success on the merits [of their claims]," and thus are not entitled to injunctive relief. *See Church*, 30 F.3d at 1342.

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[8] Despite controlling precedent in this circuit, the district court relied upon *Haitian Ctrs. Council, Inc. v. Sale*, 823 F.Supp. 1028 (E.D.N.Y.1993) vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994) [hereinafter *HCC*], to support its grant of the preliminary injunction as to the Cuban migrants. Whatever may be the effect in the Eastern District of New York of this now vacated district court decision in *HCC*, it has no precedential value in this circuit. Much of the reasoning in that decision is contrary to binding precedent in this circuit.

[9] We are bound by precedent established by this court, by the Fifth Circuit prior to October 1, 1981, and by the Supreme Court of the United States. *See C.G. Willis, Inc. v. Director, Office of Workers' Compensation Programs*, 31 F.3d 1112, 1115 n. 8 (11th Cir.1994) ("Only the en banc court or the Supreme Court may overrule the settled law of this circuit."); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209, 1210 (11th Cir.1981) (en banc) (adopting the decisions of the Fifth Circuit handed down on or before September 30, 1981, as precedent in the Eleventh Circuit, reasoning that "[s]tability and predictability are essential factors in the proper operation of the rule of law."). We recognize no other legally binding precedent. While other circuit and district courts may have considered similar issues, it is the case law of this circuit which governs our decisions. Specifically, *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir.) (per curiam), *cert. denied*, — U.S. —, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992) [hereinafter *HRC II*], *Jean v. Nelson*, 727 F.2d 957 (11th Cir.1984) (en banc) [hereinafter *Jean I*], *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) [hereinafter *Jean II*], and the Supreme Court's decision in *Sale v. Haitian Ctrs. Council, Inc.*, — U.S. —, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993), guide and bind us here.

1. *Statutory and Constitutional Rights of Migrants in Safe Haven*

The Cuban migrants and the Haitian migrants are asserting statutory rights under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 ("INA") and the Refugee Convention. The individual Cuban plaintiffs in safe haven also assert rights under the Cuban Refugee Adjustment Act, 8 U.S.C. § 1255, and the Cuban Democracy Act, 22 U.S.C. §§ 6001-6010. The individual Haitian unaccompanied minor plaintiffs assert rights against discriminatory parole decisions under 8 U.S.C. § 1182. Additionally, the individual Cuban plaintiffs advance claims to Fifth Amendment rights of due process, and the individual Haitian migrants are asserting Fifth Amendment rights to due process and equal protection of the laws.

a. *Status of Guantanamo Bay*

The district court in this case relied upon *Haitian Ctrs. Council, Inc. v. Sale*, 823 F.Supp. 1028 (E.D.N.Y.1993), vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994) [hereinafter *HCC*], in entering its order granting the Cuban migrants meetings with lawyers upon request and barring repatriation of migrants without prior legal consultation. In the *HCC* case, the New York district court found that lawyers had a First Amendment right to free speech and association for engaging in legal consultation[10] at Guantanamo Bay because it was a naval base over which the United States has "complete control and jurisdiction" and "where the government exercises complete control over all means of delivering communication." *Id.* at 1040. The district court here erred in concluding that Guantanamo Bay was a "United States territory." October 31 Order at 9. We disagree that "control and jurisdiction" is equivalent to sovereignty. *See* Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 26, 1903, U.S.-Cuba, T.S. No. 418 (distinguishing between sovereignty of the Republic of Cuba over the

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[10] The Eastern District of New York declined to decide whether the migrants at Guantanamo Bay themselves had any First Amendment rights. *HCC*, 823 F.Supp. at 1041.

leased land and the "control and jurisdiction" granted the United States), reprinted in 6 Bevans 1113-15; *cf. United States v. Spelar*, 338 U.S. 217, 221-22, 70 S.Ct. 10, 12, 94 L.Ed.3 (1949) (construing the Federal Tort Claims Act not to apply to an American military air base in Newfoundland because the lease between Newfoundland and the United States "effected no transfer of sovereignty with respect to the military bases concerned").

The Cuban Legal Organizations and HRC attempt to circumvent precedent in this circuit by arguing that *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir.) (per curiam), *cert. denied*, — U.S. —, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992) [hereinafter "HRC II "], in contrast with the instant case, dealt solely with Haitians who were interdicted on the high seas and returned to Haiti by United States Coast Guard cutters. However, we also addressed the claims of Haitians who were interdicted on the high seas and then transported to Guantanamo Bay. *See HRC II*, 953 F.2d at 1514; *id.* at 1516-17 (Hatchett, J., dissenting). Based upon our holding in HRC II, 953 F.2d at 1510, we again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are "functional[ly] equivalent" to being land borders or ports of entry of the United States or otherwise within the United States.[11] Therefore, any statutory or constitutional claim made by the individual Cuban plaintiffs and the individual Haitian migrants must be based upon an extraterritorial application of that statute or constitutional provision.

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[11] Panama regained sovereignty over the Panama Canal Zone and the area where the United States maintains military installations by the Panama Canal Treaty of 1977. Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., art. III § 1, art. IV, § 2, 33 U.S.T. 39; Panama Canal Treaty, Implementation of Article IV, Sept. 7, 1977, U.S.-Pan., art. I, annex A, 33 U.S.T. 307.

b. *Extraterritorial Application of Legislation and the Constitution*

If the migrants have been provided rights by statute,[12] we need not reach the constitutional questions urged upon us. However, because the Cuban Legal Organizations and HRC struggle to re-assert statutory claims foreclosed by *HRC II* and *Sale v. Haitian Ctrs. Council, Inc.*, — U.S. —, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993), and fail to assert new meritorious statutory claims, we reach the constitutional issues as well.

We decided in *HRC II*, 953 F.2d at 1510, and the Supreme Court agreed in *Sale*, — U.S. at —, —, 113 S.Ct. at 2557-58, 2563, that the very same statutes and treaties regarding repatriation, Article 33 of the Refugee Convention,[13] and the INA, specifically, 8 U.S.C. § 1253(h)[14] and 8 U.S.C. § 1158(a)[15] do

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[12] Domestic legislation is not presumed to apply extraterritorially absent express Congressional authorization. *See Sale*, — U.S. at —, —, —, 113 S.Ct. at 2561, 2562, 2567 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has responsibility.").

[13] Article 33 of the Refugee Convention states in pertinent part that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality ... or political opinion." Refugee Convention, *supra*, art. 33, 19 U.S.T. at 6276. We have held that this article is not self-executing, but must be given force by enactment of domestic legislation. *Baker*, 949 F.2d at 1110.

[14] Section 1253(h)(1), the domestic legislation implementing Article 33, provides that "[t]he Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality ... or political opinion." Nothing in this statute extends its application "beyond the borders of the United States." *HRC II*, 953 F.2d at 1509-10. The individual Cuban plaintiffs also assert rights under 8 U.S.C. §§ 1101(a)(42), 1157(c), 1182, 1225, 1226, and 1362; however, because these provisions merely supplement rather than address the questions presented to us, we consider their claims as being made under § 1253(h) and § 1158(a).

[15] Section 1158(a) provides that:

not apply extraterritorially. In *HRC II*, we unequivocally held that the interdicted Haitians could not claim any rights under sections 1253(h) or 1158(a). We further concluded that:

> the interdicted Haitians [on Coast Guard cutters and at Guantanamo Bay] have none of the substantive rights–under ... the 1967 United Nations Protocol Relating to the Status of Refugees, the Immigration and Naturalization Service Guidelines, the Refugee Act of 1980, the Immigration and Nationality Act, or international law–that they claim for themselves or that the HRC claims for them.

HRC II, 953 F.2d at 1513 n. 8 (emphasis added). These laws, which govern repatriation of refugees, bind the government only when the refugees are at or within the borders of the United States. *See id.* at 1509-10. Therefore, the claims asserted by the migrants under the INA and under Article 33 continue to be untenable.

The individual Cuban plaintiffs attempt to utilize the Cuban Refugee Adjustment Act, 8 U.S.C. § 1255, and the Cuban Democracy Act, 22 U.S.C. §§ 6001-6010, to assert the right of the Cuban migrants to seek parole and asylum in the United States. While these acts acknowledge the political climate in Cuba, provide for economic sanctions for dealing with Cuba, and allow for certain rights for Cubans who reach the United States, they do not address the rights of Cuban migrants to enter or to seek entry to the United States initially, nor do they confer directly any rights upon the Cuban migrants outside the United States. Hence, neither of these acts can be relied upon by the

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The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. § 1158(a). We have found that the "clear meaning of this language" is that persons interdicted before reaching the United States cannot base a right to asylum or asylum processing on this provision. *HRC II*, 953 F.2d at 1510.

individual Cuban plaintiffs to assert a right against repatriation or to seek parole or asylum in the United States from safe haven.

Right to Counsel

The individual Cuban plaintiffs and the individual Haitian migrants claim a due process right to obtain and communicate with legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven. In order for the migrants to have a right to counsel, they must first have a protectable liberty or property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 569-572, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548 (1972). The Executive Branch has made the policy decision not to offer preliminary refugee determination interviews, or "screening"[16] to the Cuban or Haitian migrants. In previous Haitian migrant cases, migrants who had been held to have a liberty interest to which due process could attach were "screened-in" by the government. *See HCC*, 823 F.Supp. at 1042; *Haitians Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1345 (2d Cir.1992), *vacated as moot sub nom. Sale v. Haitians Centers Council, Inc.*, — U.S. —, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993). In this case we need not decide whether any such putative liberty interest arises from being "screened-in." As discussed below, no such procedure was undertaken.

The individual Cuban and Haitian plaintiffs have argued that the processing which occurs when migrants are brought into safe haven is similar to the screening procedure which takes place when the government attempts to discern if a migrant is a refugee. However, providing safe haven residency is a gratuitous humanitarian act which does not in any way create even the

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[16] "Screening" is a preliminary process during which a determination may be made that the migrant has a well-founded fear of persecution if repatriated. *See Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1345 (2d Cir.1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, — U.S. —, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993). If the migrant is preliminarily ascertained to have a well-founded fear of persecution if repatriated, the migrant is "screened-in." *See id.* If after an interview, the determination is made that the migrant does not have such a fear, then the migrant is "screened-out" and repatriated.

putative liberty interest in securing asylum processing that the Second Circuit found that initial screening creates. *See McNary*, 969 F.2d at 1345 ("By these humanitarian actions alone [(rescuing the migrants from the sea and bringing them to Guantanamo Bay)], it does not appear that the legal status of the aliens was altered. However, once the interdicted persons have been 'screened in' the appellants[ ] ... can fairly be said to have established a reasonable expectation in the 'screened in' plaintiffs in not being wrongly repatriated...."). We also note that the district court mistakenly relied upon the *HCC* case, because that case addressed only the plight of Haitian migrants who had been "screened in" as possible refugees. *HCC*, 823 F.Supp. at 1041 ("Here, the Haitian Service Organizations have been retained by the Screened In Plaintiffs and have asserted a right to speak with their clients, the screened-in Haitians." (emphasis added)). The migrants in this case have not been "screened in" or otherwise processed for asylum. By bringing the migrants to safe haven, the government has not created any protectable liberty or property interest against being wrongly repatriated and the migrants may not rest a claim of right of counsel and information on the due process clause.

Unaccompanied Minor Haitians' Right to Parole

The individual unaccompanied minor Haitian migrants are asserting statutory and constitutional equal protection claims to be paroled into the United States on the same basis that unaccompanied minor Cubans have been or may be paroled into the United States.[17] The unaccompanied minor Haitian migrants claim that the Attorney General has abused her discretion under the INA, 8 U.S.C. § 1182,[18] by paroling in Cuban unaccompa-

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[17] "Parole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter...." *Jean I*, 727 F.2d at 972.

[18] Section 1182(d)(5)(A) provides in part:

> The Attorney General may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission into the United States.... § 1182(d)(5)(A).

nied minors but not Haitian unaccompanied minors. While this claim is not dependent upon the extraterritorial application of the statute, it fails nonetheless. We agree with our en banc court's statement in *Jean v. Nelson*, 727 F.2d 957, 981-82 (11th Cir.1984) (en banc) [hereinafter "*Jean I*"], *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) [hereinafter "*Jean II*"], that "there is little question that the Executive has the power to draw distinctions among aliens based on nationality." *Jean I*, 727 F.2d at 978 n. 30; *see* generally, Exec. Order No. 12,711, 55 Fed.Reg. 13,897 (1990), reprinted in 8 U.S.C. § 1157. This authority extends both to the President of the United States and to the Attorney General.[19] *Jean I*, 727 F.2d at 978. Aliens may be excluded or denied parole on grounds that might be "suspect in the context of domestic legislation," because "there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility." *Id.* at 965 n. 5. Here, the Attorney General has exercised her discretion on the legitimate basis of the very different political climates in Haiti, under the newly restored democratic President Jean-Bertrand Aristide on the one hand, and in Cuba, under the regime of Fidel Castro on the other. *See Garcia-Mir v. Smith*, 766 F.2d 1478, 1492 (11th Cir.1985) (per curiam) (holding Attorney General need only assert a " 'facially legitimate and bona fide' " reason for a parole decision (*quoting Jean I*, 727 F.2d at 977)), cert. denied, 475 U.S. 1022, 106 S.Ct. 1213, 89 L.Ed.2d 325

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[19] We note, however, that in the Supreme Court's affirmance of Jean I, its holding was limited to whether " 'low-level ... government officials [may] act in such a manner which is contrary to federal statutes ... and the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement.' " *Jean II*, 472 U.S. at 853, 105 S.Ct. at 2996 (first omission added) (quoting Brief for Pet'rs at 37). While we held in *Jean I* that lower-level Immigration and Naturalization Service officials could not disregard the orders of their superiors, here we are faced with the extensive authority of the Attorney General and the President to make distinctions on the basis of citizenship and the political climate of the alien's homeland.

(1986). Thus, we hold that the statutory claims made by the unaccompanied minor Haitian migrants are without merit and cannot justify an injunction directing the government to parole them into the United States. Because we conclude that the statute alleged does not protect the unaccompanied Haitian minors, we address their constitutional equal protection claim.

In *Jean I*, we held that unadmitted and excludable aliens "cannot claim equal protection rights under the Fifth Amendment, even with regard to challenging the Executive's exercise of its parole discretion." 727 F.2d at 970 (emphasis added).[20] The plaintiffs in *Jean I* could not "challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole, on the basis of the rights guaranteed by the United States Constitution," *id.* at 984, because they had "no constitutional rights with regard to their applications," *id.* at 968; *accord Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); *cf. Perez-Perez v. Hanberry*, 781 F.2d 1477, 1479 (11th Cir.1986) ("The world is not entitled to enter the United States as a matter of right."). The individual unaccompanied Haitian migrants here, who are outside the borders of the United States, can have no greater rights than aliens in Jean I who were physically present in the United States. *See Landon*, 459 U.S. at 32, 103 S.Ct. at 329 ("[H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

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[20] Although the Supreme Court held that we should not have reached the constitutional issue in that case because "the current statutes and regulations provide petitioners with nondiscriminatory parole consideration--which is all they seek to obtain by virtue of their constitutional argument," *Jean II*, 472 U.S. at 854-55, 105 S.Ct. at 2997, our en banc holding in that case regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds. *See also Perez-Perez v. Hanberry*, 781 F.2d 1477, 1479 (11th Cir.1986) (dictum); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir.1985) (per curiam) (dictum); *Jean v. Nelson* 863 F.2d 759, 770 (11th Cir.1988) (dictum), *aff'd*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990).

In *HRC II*, we concluded that the interdicted Haitians on Coast Guard cutters and at Guantanamo Bay did not possess any of the statutory rights they claimed under the INA and the Refugee Convention, or the constitutional rights they claimed under the due process clause of the Fifth Amendment, and the First Amendment. *HRC II*, 953 F.2d at 1503, 1511 n. 6 (agreeing with the district court that the Haitian migrants had no "correlative First Amendment rights of their own"). Our decision that the Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert is supported by the Supreme Court's decisions declining to apply extraterritorially either the Fourth Amendment, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75, 110 S.Ct. 1056, 1066, 108 L.Ed.2d 222 (1990) (rejecting Fourth Amendment limits to search and seizure of property owned by a non-resident alien conducted in Mexico by United States agents), or the Fifth Amendment, *Johnson v. Eisentrager*, 339 U.S. 763, 784, 70 S.Ct. 936, 947, 94 L.Ed. 1255 (1950) (rejecting claim that aliens outside the sovereign territory of the United States are entitled to Fifth Amendment rights). *Cf. Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion) (holding the right to a jury trial applies to an American citizen abroad being tried by a United States military court (narrowest holding)). Clearly, aliens who are outside the United States cannot claim rights to enter or be paroled into the United States based on the Constitution.

Therefore, any right to equal protection of the laws, due process, or rights under the INA or the Refugee Convention now asserted by the Haitian and Cuban migrants are not cognizable. Thus, neither group of migrants could have a "substantial likelihood of success on the merits" which is a necessary predicate to the grant of injunctive relief. The district court erred in granting relief to the individual Cuban and Haitian migrants.

2. *First Amendment Rights of the Cuban Legal Organizations and HRC*

Both the Cuban Legal Organizations and HRC claim a First Amendment right to freedom of association with the migrants

and free speech such that the government must provide the lawyers access to clients and any other migrants who request counsel. In *HRC II*, we held that the two primary First Amendment cases recognizing a First Amendment right for a lawyer to solicit a client for the purpose of engaging in litigation as a form of political expression, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), "recognize a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression." *HRC II*, 953 F.2d at 1513 (emphasis added). However, we concluded that "[t]his right is predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant...." *Id.* (emphasis added).[21]

Neither the Cuban nor the Haitian migrants have any of the statutory or constitutional rights claimed here that might sustain the attorneys' claims to right of association, and "associational freedom in no way implies a right to compel the Government to provide access to those with whom one wishes to associate." *Id.* Hence, it would be not only improper, but also "nonsensical," for us to hold today that attorneys for either migrant group suddenly possess "a right of access to the interdicted [migrants] for the purpose of advising them of their legal rights." *Id.*

Because, under precedent of this circuit, neither the migrants nor the lawyers may assert First Amendment rights of association and speech in this context, we need not determine whether the government engaged in any viewpoint-based discrimination in denying the Cuban Legal Organizations and HRC access while granting humanitarian organizations access. Pro-

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[21] *Button* and *In re Primus* "do not recognize a right of access to persons properly in government custody," *HRC II*, 953 F.2d at 1512, which is what the Cuban Legal Organizations and HRC have requested. The lawyers' claims under the First Amendment do not require that the government assist it in communicating with clients or potential clients in safe haven. *Id.* at 1513. Although the attorneys argue that they require no financial assistance or transportation from the government, for the lawyers to meet with their clients, assistance is necessarily required in providing access to the base, meeting areas, accommodations and security.

viding humanitarian organizations access to the migrants does not, without more, create a First Amendment right to that access for those humanitarian organizations or for the Cuban Legal Organizations and HRC. If the First Amendment does not apply to the migrants or to the lawyers at Guantanamo Bay, the government cannot be engaging in impermissible viewpoint-based discrimination by restricting association between the migrants and counsel. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 46, 103 S.Ct. 948, 954, 955, 74 L.Ed.2d 794 (1983) (holding first that the First Amendment applied to teachers' mailboxes in a public school, but that the " 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government,' " and that there was no First Amendment right to access to the mailboxes (*quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2684, 69 L.Ed.2d 517 (1981))).[22]

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[22] We recognize that the *HCC* court found that "First Amendment [is] applicable to U.S. conduct on a military base." 823 F.Supp. at 1040. The court cited *Flower v. United States*, 407 U.S. 197, 198-99, 92 S.Ct. 1842, 1843-44, 32 L.Ed.2d 653 (1972) (*per curiam*) for this proposition. From our reading of Flower we find it is clearly distinguishable. The military base in question in Flower was Fort Sam Houston in San Antonio, Texas; not Guantanamo Bay or an installation in Panama. There, a civilian (an American citizen) was arrested for distributing leaflets on an road within the fort. The Supreme Court found that the road was essentially a public one as there was "no sentry post or guard at either entrance or anywhere along the route," *Flower*, 407 U.S. at 198, 92 S.Ct. at 1843 (*quoting United States v. Flower*, 452 F.2d 80, 90 (5th Cir.1972) (Simpson, J. dissenting)), and more than 15,000 cars travelled through the fort each day via this road. These are facts not remotely analogous to the access policies at Guantanamo Bay, Cuba, or presumably at the installations in Panama. Moreover, the Supreme Court has recognized the limited nature of its holding in Flower. *See Greer v. Spock*, 424 U.S. 828, 835, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976); *U.S. v. Albertini*, 472 U.S. 675, 684-86, 105 S.Ct. 2897, 2904-05, 86 L.Ed.2d 536 (1985); *see also M.N.C. of Hinesville, Inc. v. U.S. Dept. of Defense*, 791 F.2d 1466, 1473 n. 3 (11th Cir.1986). Hence, we are of the opinion that this case does not stand for the proposition that the First Amendment necessarily applies at American military bases located in foreign countries.

For the above reasons, an injunction requiring the government to provide reasonable and meaningful access of legal counsel to the migrants in the safe haven, based on First Amendment rights of the attorneys is not justified.

3. *Disclosure of Haitian Migrants' Identities*

HRC contends that the government's refusal to disclose the identities of Haitian migrants at Guantanamo Bay violates HRC's First Amendment rights to freedom of association and violates the Haitian migrants' rights to equal protection of the laws and rights under the INA and international law. The district court, without stating its reasons, ordered that the government provide HRC a list of all Haitian migrants in safe haven. As decided above, the Haitian migrants in safe haven cannot claim the rights and privileges of the statutes enumerated or of the Constitution with respect to a right to counsel, their repatriation or parole into the United States. Thus, they cannot succeed on any claim that they have rights that are being violated by failure to disclose their identities to HRC. What remains then is a request by HRC that the government release information. Such a claim is typically made under the Freedom of Information Act; however, no claim has been made under the Act here. Instead, this claim is constitutional in nature. The Supreme Court has held that there is "no discernible basis for a constitutional duty [on the government] to disclose, or for standards governing disclosure of or access to information." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553 (1978) (plurality opinion). "This Court has never intimated a First Amendment guarantee of access to all sources of information within government control." *Id.* at 9, 98 S.Ct. at 2593-94. Because there is no authority for us to compel disclosure of the Haitian migrants' identities, we cannot force the government to provide HRC with access to the list of Haitian migrants in safe haven. *See id.*

III. CONCLUSION

While we have determined that these migrants are without legal rights that are cognizable in the courts of the United States,

we observe that they are nonetheless beneficiaries of the American tradition of humanitarian concern and conduct. In the context of the refugees' world of today (e.g., Bosnia and Rwanda) this is significant. While these migrants are faced with difficult conditions, the demonstrated concern of groups like the Cuban Legal Organizations and HRC and the goodwill of their military rescuers and caretakers will hopefully sustain and reassure them in their quest for a better life.

Nevertheless, we cannot contravene the law of this circuit and of the Supreme Court of the United States in order to frame a legal answer to what is traditionally and properly a problem to be addressed by the legislative and executive branches of our government. *See Perez-Perez*, 781 F.2d at 1479. "Although the human crisis is compelling, there is no solution to be found in a judicial remedy." *Sale*, — U.S. at —, 113 S.Ct. at 2567 (*quoting Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 841 (D.C.Cir. 1987) (Edwards, J., concurring)). For the foregoing reasons, the preliminary injunctions issued by the district court and dated October 31, 1994, November 22, 1994, and November 28, 1994, together with our December 19 Order, are hereby DISSOLVED, and these cases are REMANDED to the district court with direction to dismiss the plaintiffs' claims.

Appendix B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5138

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors-Appellees,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Before KRAVITCH, BIRCH, and CARNES, Circuit Judges.

BY THE COURT:

The court denies the appellants' motion for summary reversal with respect to the order of the district court entered on October 31, 1994 denominated "Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order" ("the Injunction"). The parties are instructed to file briefs on the schedule set out below.

This court hereby stays all of the district court's injunctive relief set out in the Injunction except as hereafter provided:

(a) defendants shall afford reasonable and meaningful access for legal counsel (i.e., officers of the court) to only the named detained plaintiffs and any other detainees who in the future request counsel by written declaration;

(b) plaintiff organizations and counsel need not be afforded access to any other detainees pending the resolution of this appeal;

(c) the defendants may repatriate all current detainees in "Camp November" who have expressed a desire, by written declaration, to be returned to sovereign Cuba;

(d) the defendants may repatriate any other detainees who express a desire by written declaration to be returned to sovereign Cuba; and

(e) the defendants shall not repatriate any detainees who do not express, by written declaration, a desire to be returned to sovereign Cuba.

The briefing schedule is as follows: the government's opening brief is due November 21, 1994; the appellees' answer brief is due December 7, 1994; and the government's reply brief, if it chooses to file one, will be due December 14, 1994. These dates are the date that the briefs must be received in the Clerk's Office and in the office of opposing counsel.

Counsel are advised that all Eleventh Circuit rules relating to the length and format of the brief, including type size and margins and footnotes must be strictly adhered to. Counsel are further advised that that court will not grant any motion to file a brief exceeding the page limitations or any motions for an extension of time to file a brief.

Oral argument will be held on Monday, December 19, 1994 at 10:00 a.m. at 56 Forsyth Street, Atlanta, Georgia. Each side shall be allotted 45 minutes for argument.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I concur in the order of the Court denying Appellants' Motion for Summary Reversal. I also concur in that portion of the stay relating to the District Court's injunctive relief except as to paragraph (b) of this Court's order, from which I dissent. I would permit legal counsel, pending the resolution of this appeal, to have access to any detainee, who has not expressed

the desire to be returned to sovereign Cuba, under such reasonable conditions as would be set by the District Court.

Date: November 7, 1994

Appendix C

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs,

and

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants.

Case No. 94-2183-CIV-ATKINS

ORDER ON PROVISIONAL INTERVENORS' MOTION FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE comes before the court on Haitian Refugee Center's (HRC) Motion for Temporary Restraining Order (d.e. 32). HRC asks the court to enter an order enjoining the defendants from denying HRC access to its clients at Guantanamo Bay, requiring the defendants to release names of Haitians detained at Guantanamo Bay, requiring the defendants to parole unaccompanied Haitian minors in a manner similar to the process used for paroling unaccompanied Cuban minors and to grant HRC the right to expedited discovery.

The court heard arguments on the subject motion on November 21, 1994. Upon consideration of the record and the arguments before the court, it is

ORDERED AND ADJUDGED that Provisional Intervenors' Motion for Temporary Restraining Order (d.e. 32) is hereby *GRANTED in part, DENIED in part* as follows:

1) defendants shall afford legal counsel for HRC reasonable and meaningful access to all named plaintiffs and any other Haitian detainees who request counsel in writing;

2) defendants shall provide unaccompanied Haitian minors equal protection and allow them parole in the same manner allowed for unaccompanied Cuban minors;

3) defendants shall release the names of all Haitian detainees at Guantanamo Bay to HRC;

4) HRC shall only release the names of the detained Haitians to their individual families or counsel upon request;

5) in light of the fact that HRC has joint-noticed all depositions the plaintiffs are taking, HRC's request for expedited discovery is denied;

6) HRC's Motion to Exceed Page Limit for Memorandum of Law-in Support of Temporary Restraining Order (d.e. 33) is hereby *GRANTED nunc pro tunc* October 31, 1994.

7) HRC shall post a bond in the amount of $500 by 5:00 p.m., November 22, 1994. Furthermore, it is

ORDERED AND ADJUDGED that pursuant TO 28 U.S.C. § 1292 (b), the court finds that this order involves controlling questions of law regarding the rights of detainees in Guantanamo Bay which are subject to a difference of opinion and that an immediate appeal may advance the ultimate termination of this case.

DONE AND ORDERED at Miami, Florida, this 22nd day of November, 1994 at 12:15 p.m.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES
DISTRICT JUDGE

Appendix D

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION, et al.,
Plaintiffs,

v.

WARREN CHRISTOPHER, et al.,
Defendants,

and

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors.

Case No. 94-2183-CIV-ATKINS

OMNIBUS ORDER

THIS CAUSE is before the court on Defendants' November 25, 1994 Motion to Vacate Injunction or Alternatively to Stay Injunction Pending Appeal and on Provisional Intervenor's November 25, 1994 Motion for Expedited Discovery. This Court heard argument on both motions on November 28, 1994.

I. Motion to Vacate or Stay Injunction

In their motion, defendants ask this court to vacate, or in the alternative stay, its November 22, 1994 Order on Provisional Intervenors' Motion for Temporary Restraining Order. In that order, the court (1) granted legal counsel for HRC access to named plaintiffs and any other Haitian detainees requesting counsel in writing; (2) ordered defendants to parole unaccompanied Haitian minors in the same manner followed for Cuban minors; (3) ordered defendants to release the names of Haitians detained at Guantanamo and (4) denied HRC's request for expedited discovery. Additionally, the court recognized the appealability of its Order under 28 U.S.C. § 1292(b).

The court agrees with the defendants' contention that one of the key underlying issues in this case is whether the detainees in Guantanamo, both Cuban and Haitian, have any rights under United States laws. Therefore, the court finds that a stay of its November 22, 1994 Order is warranted with respect to the equal protection issues of parole and name dissemination.

II. Motion for Expedited Discovery

In support of its Motion to Vacate or Stay Injunction Pending Appeal, the defendants attached five (5) affidavits touching on varying factual issues. Consequently, HRC filed a Motion for Expedited Discovery, seeking to depose the five affiants in order to respond to the defendants' motion. In opposition to HRC's Motion for Expedited Discovery, the government argued, *inter alia*, that the court should deny the motion because the appeal involves only legal issues. However, at the hearing, the defendants additionally stated that the purpose of the affidavits is to give a background for appeal. The court finds that in order for the Eleventh Circuit to have a complete record, should the defendants choose to appeal the November 22, 1994 Order, HRC should have the opportunity to depose the five affiants and supplement such background if necessary.

Therefore, for the above-mentioned reasons, it is

ORDERED AND ADJUDGED that the Defendants' November 25, 1994 Motion to Vacate Injunction or Alternatively to Stay the November 22, 1994 Injunction Pending Appeal is hereby *GRANTED IN PART; DENIED IN PART* as follows:

1) that portion of the Order granting legal counsel access to named plaintiffs and any other Haitian detainees who request counsel in writing is hereby *AFFIRMED*;

2) that portion of the Order requiring defendants to parole unaccompanied minors is hereby *STAYED* pending appeal;

3) that portion of the Order requiring defendants to disseminate the names of Haitian detainees is hereby *STAYED* pending appeal; and

4) that portion of the Order denying HRC expedited discovery is hereby *AFFIRMED* except as delineated below. Accordingly, it is further

ORDERED AND ADJUDGED that Provisional Intervenors November 25, 1994 Motion for Expedited Discovery is hereby *GRANTED* to the extent that provisional intervenors may depose John C. Harris, Michael Skol, Jay E. Laroche, Kenneth Leutbecker and Colonel Michael A. Pearson regarding the subject matter of their respective affidavits filed in conjunction with the Defendants' Motion to Vacate or Stay Injunction.

DONE AND ORDERED at Miami, Florida, this 28th day of November, 1994.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES
DISTRICT JUDGE

Appendix E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5138
No. 94-5231 and 94-5234

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors-Appellees,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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Before KRAVITCH, BIRCH, and CARNES, Circuit Judges.

BY THE COURT:

Pending decision of this court, the following is ordered:

(1) This court's order of November 7, 1994 is hereby dissolved;

(2) All injunctions and orders of the district court in these cases are hereby stayed; and

(3) All further proceedings, including discovery, in the district court in these cases are hereby stayed.

Date: December 19, 1994

Appendix F

Excerpts From
Plaintiff-Intervenor HRC's Verified Complaint
October 31, 1994

13. The HRC's membership includes United States citizens, resident aliens and non-resident aliens, including the individual Haitian refugee intervenor-plaintiffs and the class they represent, as well as the parents, relatives and representatives of some of the unaccompanied minors detained at Guantanamo. HRC's membership interests, including its financial support, is directly affected by the policy of discriminatory detention and forced repatriation by making HRC's work of assisting the refugee community more difficult. This results in the diversion of HRC's limited resources away from members and clients having other needs.

28. President Aristide was elected in December 1990 in the first fully democratic elections to take place in Haiti in over 200 years. Shortly thereafter, President Aristide was overthrown by a military-led coup and forced into exile in the United States. The coup reulted in a widely publicized reign of terror in Haiti in which supporters (and suspected supporters) of the Aristide government and democracy were killed or subjected to violence and destruction of their property, producing fear and desperation throughout the country.

29. In the wake of this chaos and mass violence, thousands of Haitians sought to escape by sea. Many of the Haitians who fled in the 1991-92 time frame were interdicted by the United States Coast Guard and detained at the U.S. military installation at Guantanamo Bay, Cuba.

Appendix G

Department of Justice Press Release, December 2, 1994

DEPARTMENT OF JUSTICE TO REVIEW CUBAN CHILDREN'S CASES INDIVIDUALLY

Attorney General Janet Reno announced today that at the direction of the President, she will consider the humanitarian parole, on a case-by-case basis, Cuban children for whom long-term presence in the safe havens at Guantanamo or Panama would constitute an extraordinary hardship, together with such immediate family members as humanitarian needs require.

Only families for whom there is full financial sponsorship in the United States will be paroled.

Appendix H

Memorandum from Gregg A. Beyer,
Director, Asylum Division, INS
to Asylum Office Directors, October 27, 1994

Subject: Adjudication of Haitian Asylum Applications Following President Aristide's Return to Haiti

HQASM has received several requests for guidance on the adjudication of Haitian asylum claims following the return of President Jean-Bertrand Aristide to Haiti. While this development represents the beginning of potentially significant changes in country conditions, there is no guarantee at the present time that they will produce fundamental changes which are durable over time.

Existing INS policy on asylum adjudications during changing country conditions was established in January 1990 in then Commissioner Gene McNary's memorandum entitled, *Adjudication of Asylum and Refugee Claims of Eastern European and Soviet Applicants Under the Uniform Worldwide Adjudication Standard During Times of Evolving Country Conditions*. The key points of that memorandum state that in countries with long histories of severe political repression and serious violations of fundamental human rights, the possibility of abuse and persecution continues at local levels even when official policies and/or composition of governments at the top have changed. Actual improvements at the local levels of government and society undoubtedly lag behind the legal and/or rhetorical potential for improvements articulated at the national level. In these situations, it is important to note that much of the potential for change is more significantly manifested at the top than at the bottom, and in the urban centers of a country rather than in the rural areas. Many "old line" officials, their supporters, and some of the more conservative elements of the general population have not necessarily kept pace with or approved of the changes being articulated.

The 1990 memo also states that, "[r]ather than simplifying the work of INS, these changes will make the job of the INS adjudicator during their case-by-case interviews with refugee [and asylum] applicants more challenging. Officers must keep in mind not only the possibility of a reasonabl[y] well-founded fear of [future] persecution based on evidence, or past persecution, as the basis for asylum or refugee status . . ., but also the possibility that evolving conditions in refugee-producing countries of origin will result in applicants with new and potentially valid claims of persecution or a reasonable fear thereof . . ."

This policy guidance on evolving country conditions in Eastern Europe and the former Soviet Union is especially relevant to Haiti, a country that emerged from nearly two centuries of relentless repression for a brief experiment with democracy in 1991 only to have it curtailed by a coup which, for the past three years, has plunged the country into one of its most repressive eras. Although repressive activities have been sharply reduced by the presence of the U.S. military, the structures tha[t] supported and effected the September 1991 military coup are still present, if currently under wraps. These elements involved in controversial past practices include, but are not limited to, the small wealthy elite, the military, the police, the section chiefs, the attaches (heirs of the Tontons Macoutes), the Front for the Advancement and Progress of Haiti (FRAPH), and other paramilitary structures. While the immediate threat of serious human rights violations perpetrated and tolerated by various repressive sectors of Haitian society is clearly reduced as long as U.S. troops are in Haiti, there are accounts of ongoing violations and killings.[1] More significant is the continuing, often "invisible," presence of these perpetrators of past viola-

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[1] Farah, Douglas and Booth, William, "Grenade Kills 5 in Haitian Crowd," *Washington Post* (Washington, D.C.: 30 September 1994), p.A34/Rohter, Larry, "2 Slain by Attaches on Aristide's First Full Day Back," *New York Times* (New York: 17 October 1994) p.A3 - as reported on NEXIS database./Coughlin, Dan, "Haiti: Refugee Repatriation and Political Violence Surge," *Inter Press Service* (New York: 12 October 1994) - as reported on NEXIS database./"14 Haitians Die in Attack with Truck," *Los Angeles Times*(Los Angeles: 10 October 1994), p.A6 - as reported on NEXIS database.

tions who have simply, and probably only temporarily, retreated into the background. Efforts to completely disarm the police, attaches, former Tontons Macoutes and members of FRAPH are still of limited success, leaving them with the potential for future abuse. This potential has continued domestic and international concerns about both the short and long-term prognoses for a fundamental and durable development of the rule of law and democracy in Haiti.[2]

In view of these concerns and the general policy regarding changing country conditions established in 1990, Asylum Officers are advised to continue to adjudicate Haitian claims based on the March 1993 *Considerations* issued by John W. Cummings, Acting Director of the Office of International Affairs (copy attached) and the INS Resource Information Center Information packet, *Haiti: Country Conditions Documents for Adjudicating Haitian Asylum/Refugee Claims* [IP/HTI/94.001], May 1994. An updated Information Packet is currently being compiled.

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[2] Bray, Jeff, "Aristide Faces Uphill Battle in Haiti," *United Press International*(New York: 11 October 1994) - as reported on NEXIS database./Todd, Dave, "Sitting on a Powder Keg . . ." *The Gazette* (Montreal: 14 October 1994), p.B3 - as reported on NEXIS database./O'Connor, Anne-Marie, "Can Thugs Be Refitted Guardians of Liberty?" *The Palm Beach Post* (Palm Beach, FL: 18 October 1994) p. IA - as reported on NEXIS database./Lowthwaite, Gilbert A., "U.S. Basks Success, But Isn't Out of Woods Yet," *The Baltimore Sun* (Baltimore, MD: 18 October 1994), p.4A - as reported on NEXIS database./Preston, Julia "U.N./U.S. Clash on Disarming Haitians . . .," *Washington Post* (Washington, D.C.: 20 October 1994), p.A31 - as reported on NEXIS database./Robberson, Tod, "U.S. Writ Runs Short of Some Haitians 'Attaches,'" *Washington Post* (Washington,D.C.: 24 October 1994). p.A13.

Appendix I

Affidavit of Esther Deristile
December 8, 1994

My name is Esther Deristile. I am detained at the U.S. Naval Base at Guantànamo Bay, Cuba. I am 14 years old. I just turned 14 on December 5. I am in Camp 9, tent C-4. I have been here at Guantànamo since July 2. I came from Delma in Haiti. My father lives in Boyton Beach, Florida, but I don't know where my mother is because she was taken away in Haiti on June 29 and hasn't been seen since. Also my brother was killed on March 26. He was 27 years old and working for a radio station. I am very afraid to go back to Haiti because I have no family there now and because of what happened to my family there I am still very scared.

Until today, I still don't feel normal being here at Guantànamo. I often feel sick and very weak mentally. I am very depressed to be here like this, not knowing what will happen to me. Today I am going to visit with a psychologist. All of the children I think are sad. I have tried to end my life twice because I am so sad. I just started seeing the psychologist on Monday. The last time I tried to end my life was about 22 days ago, I drank Clorox. I went to the hospital because as soon as I drank it I felt like the inside of my stomach was coming to my mouth, and my mouth was foaming so people around me called the doctor. I didn't tell the doctor why I drank the Clorox, because I was afraid it was something personal and I didn't want them to know I was suffering mentally within myself, so I said I drank the Clorox by mistake. And I don't want to worry my sister who is living here with me.

I cannot eat a lot of the time, and I don't sleep well because I am so anxious about my situation. I wake up around 4:00 in the morning and I walk around until its light. I go to school after breakfast but I don't really hear or see anything that's going on because I am so said. After school they give me an apple and I go and sit under a tree, trying to imagine different ways I can

get out of this situation. It is difficult for me to get involved in any of the things going on here because I feel so terrible all the time.

There was a hunger strike that the children went on, about 2 weeks ago, because the children said they spent too long here and they wanted to know what the military was going to do with them. We had heard the Cuban children were going to the United States.

There are many children here who are not 14 years old yet. We feel so helpless and alone, not knowing what will happen to us. And there is no phone in our camp, camp 9. For two months we haven't been able to speak to our families. They used to allow us phones but not anymore.

I really need to see a doctor because I haven't been able to urinate correctly like everyone else for several days. The doctor inserted a tube in me on 2 times so I could urinate. On November 30 and December 1 I saw a doctor about my problem. The doctors here though really mistreat you when you go see them. They really don't help you a lot. Sometimes I get stomach pains because I can't urinate properly. Could you please help me see a doctor it is very difficult for us to arrange to see a doctor here.

At the camp they give us a couple of T-shirts but often they don't fit us.

My father who lives in the U.S. is a legal resident there. I last spoke to him two months ago. He wants me to be with him in the U.S. My brother wrote my father and gave it to the Red Cross but my father never received the letter. It is not easy at all to communicate with your family when you are in here.

I haven't heard anything about the political situation in Haiti since I've been in camp 9.

I feel helpless. Please help me obtain my release from here.

CRS people about 1 week ago told us during a meeting that maybe we might be able to come to the U.S. but also that we might go back to Haiti. Living in this state of confusion is very upsetting.

I heard that a person - Bernard - abused a 14 year old girl in camp 9. This scares us all. Bernard was the president of the house parents. Bernard I think was put in jail and the abused girl is still at the camp.

When I was in Haiti I was sexually abused. This happened on March 26, the same day my brother was killed. He was killed in our house, where I was abused by the same people (men) who killed him. I haven't received any counseling here about my sexual abuse in Haiti.

I didn't see anything in our camp about the lawyers being here to meet with us. I am only here speaking with a lawyer because someone heard rumors from camp four that the lawyers were here and so my brother wrote a note saying we wanted to see a lawyer. And I want more access to the lawyers so they can try to help me.

I hereby swear under penalty of perjury on this 8th day of December, 1994, that the above is true and correct to the best of my knowledge. The above has been read to me in Creole and I agree with and affirm its contents.

/s/ ESTHER DERISTILE

Appendix J

Affidavit of Steven Forester
November 2, 1994

I, Steven Forester, hereby state as follows:

1. My name is Steven Forester. I am Supervising Attorney at the Haitian Refugee Center ("HRC") in Miami, Florida. I was HRC staff attorney from 1979 to 1985, an HRC board member from 1985 to 1992, and began as Supervising Attorney in August 1992. I am the author of "Haitian Asylum Advocacy: Questions to Ask Applicants and Notes on Interviewing and Representation," New York Law School Journal of Human Rights, Vol. X Part II, Spring, 1993.

2. I am submitting this affidavit, as a supplement to my October 31 affidavit, on the importance of HRC access to Haitian detainees on Guantanamo to determine the "volunariness" of their repatriation.

3. On July 27, 1994, during the Guantanamo visit described in paragraphs 5 and 6 of my earlier affidavit, I made a presentation in Creole to Haitian detainees who had supposedly "chosen voluntarily" to return to Haiti. Authorities informed us that all of them had previously received UNHCR screening to determine the "voluntariness" of their decision to return to Haiti and that they were all to be repatriated by the Coast Guard within or in twenty-four (24) hours. The authorities had therefore physically separated them in a separate camp enclosure from the other Haitians on Guantanamo. I made my presentation, referred to in paragraph 6 of my October 31 affidavit, to them in this separate camp.

4. Immediately after my presentation, seven (7) to nine (9) of these supposed would-be returnees informed military authorities that they did *not* wish to return to Haiti but instead wished to remain on Guantanamo. Therefore, and in my presence, military authorities immediately separated and removed all of these seven to nine Haitians from the separate camp

enclosure for would-be returnees and returned them to rejoin the rest of Guantanamo's detainee population.

5. The events described in the preceding two paragraphs occurred in the presence of INS Deputy Counsel Paul Virtue and military personnel including our military escort (whose name I believe was Colonel Johnson), were acknowledged subsequently by Immigration and Naturalization Service officials in Washington, D.C., and presumably are not in dispute.

6. United States military Psychological Operations personnel are reportedly operating among the Haitian detainees on Guantanamo. HRC has received information indicating that authorities intend to remove the remaining Haitians from Guantanamo by about November 15 regardless of their wishes.

7. In July, 1994, the United States established and engaged in a process on Guantanamo of determining, on an individual basis, whether each Haitian detainee was eligible or ineligible for "safe haven." Using interpreters, authorities asked each Haitian a series of questions which appeared on a written form, and sometimes questions were asked which were not on the form. A determination was eventually made as to whether the Haitian was eligible or ineligible for safe haven. Most were found eligible for safe haven, but some were found ineligible for safe haven through the eligibility process. Some of the interpreters on Guantanamo were intimidating and hostile to the detainees.

8. I hereby declare under penalty of perjury on this date of November 2, 1994 that the foregoing is true and correct.

/s/ STEVEN FORESTER
Steven Forester

Appendix K

Affidavit of William O'Neill
October 28, 1994

WILLIAM G. O'NEILL, being duly sworn, deposes and says:

1. My name is William G. O'Neill and I am an attorney admitted to practice law in the State of New York. I served as the Legal Director of the United Nations/Organization of American States International Civilian Mission to Haiti (the "Mission") from June 1993 to March 1994. Before joining the Mission I was the Deputy Director of the Lawyers Committee for Human Rights where one of my principal duties was monitoring the human rights situation in Haiti. I have written two book-length reports on human rights and the justice system in Haiti. I have also written numerous published articles on these subjects and I have testified before various committees of the U.S. Congress, the United Nations' Commission on Human Rights (Geneva) and the Inter-American Commission on Human Rights (Washington D.C.) concerning the human rights situation in Haiti. Since April 1994 I have been a full-time consultant to the National Coalition for Haitian Refugees and I recently spent five days in Haiti to observe the return of President Jean-Bertrand Aristide.

2. With the return of President Aristide and constitutional government to Haiti, the prospects for creating the rule of law and respect for human rights have never been greater. Huge obstacles remain, however, and I continue to receive reliable reports of on-going human rights violations by members of the Haitian armed forces against Aristide supporters, both in the Haitian countryside and in certain neighborhoods in Port-au-Prince known as Aristide strongholds.

3. The arrival on September 19, 1994 of the Multi-National Force ("MNF") under UN Security Council Resolution 940 (July 31, 1994) has deterred that Haitian military and their paramilitary forces from committing abuses in certain areas and

at certain times, but the MNF has not been deployed in large swaths of rural Haiti and its commanders have repeatedly asserted that the MNF is not a police force so that at night, especially in the Port-au-Prince neighborhoods of Cité Soleil, Carrefour, La Saline and Bel-Air, the MNF is simply not present.

4. For example, on October 12 in Montagne Terrible, which is a rural area in central Haiti, the section chief, who is a member of the Haitian armed forces responsible for rural policing, and five members of the Haitian army fired on a crowd that was having a public rally to celebrate the imminent return of President Aristide. Two people in the crowd were killed immediately and a third died on October 24 from his wounds. Eight other people were wounded and all are members of the local peasants' organization. These are precisely the type of people who have been targeted by the military over the past three years.

5. In the town of Grand Goâve, about 40 miles west of Port-au-Prince, Haitian soldiers continue to threaten and beat Aristide supporters. On October 13, as people were cleaning the street to prepare for Aristide's return, two soldiers beat and insulted Lobens Samuel and Angela Poliniste. Mr. Samuel still had a bandage on his head one week after the incident when he was interviewed by a representative of the National Coalition for Haitian Refugees. In another recent incident, Sheila Benjamin, an Aristide supporter who had been in hiding since October 1991 returned home to Grand Goâve following President Aristide's return on October 15, 1994. When a soldier saw her on the street on October 22, he beat her. Grand Goâve has been tightly in the military's grip since the coup and many local Aristide supporters are still hesitant to return. Given Sheila Benjamin's reception, this is most understandable.

6. On October 16, the day after President Aristide's return, the bodies of two young men who had been in hiding in Jacmel for most of the past three years were found in the Cité Soleil section of Port-au-Prince. They had recently returned home believing it was safe to do so. Also, Stephenson Magloire, a well-known artist and Aristide supporter, was killed in Cité Soleil shortly before Aristide's return. Mr. Magloire's family and friends

begged him not to come out of hiding because they believed it was still too dangerous; tragically, they turned out to be right.

7. The MNF's presence in rural Haiti is extremely limited. Only 1,200 U.S. army Special Forces are assigned to 30 localities. This does not even approximate the number and deployment necessary to provide minimal security in the countryside. Many Haitians live in isolated, mountain-top hamlets and 70% overall live in rural areas. Moreover, the MNF's attitude toward the Haitian military and their paramilitary force as embodied in FRAPH ("Front for the Advancement and Progress of Haiti") sometimes undermines the effort to create a safe and secure environment which is a necessary prerequisite to insuring respect for human rights. One member of the MFN recently stated that "FRAPH is a legitimate political party and we have to be neutral arbiters." For the most part, the MNF has refused to occupy or close down FRAPH offices in the countryside. Yet FRAPH's role in the brutal repression is well known and established in official reports from the Organization of American States/United Nations International Civilian Mission and other human rights monitors. Many section chiefs and their deputies remain in their posts.

8. The MNF does not patrol Cité Soleil or other urban neighborhoods at night and generally only responds to emergencies during the day. This holds true for other pro-Aristide neighborhoods in Port-au-Prince. If a soldier or member of FRAPH or the paramilitary forces is turned over to the MNF by the Haitian people, the MNF usually release the person shortly after. Thus many people who have been central to the repressive structure remain in place or nearby, heightening tension and maintaining the potential to persecute Aristide supporters once the backs of the MNF are turned. As the cases described above show, they have already turned this potential into deadly reality.

9. It is my opinion based on my knowledge of the sources and patterns of repression in Haiti, that those Haitians still in Guantànamo have reason to fear persecution based on their political opinion if forced to return to a Haiti where large parts of the countryside and key urban neighborhoods are under the sway of

the Haitian military and paramilitary where the MNF is not present and where the MNF's presence, while benign, remains limited and its mandate restricted.

/s/ WILLIAM G. O'NEILL
William G. O'Neill

Sworn to before me this
28th day of October, 1994

/s/ Patricia Armstrong
NOTARY PUBLIC

Appendix L

Excerpts From
Declaration of Kenneth Leutbecker, Associate Director for the Office of Immigration and Refugee Affairs, Community Relations Service, Department of Justice
November 4, 1994

8. CRS officials, myself included, and the UNHCR, among others, opposed releasing the names of Haitian migrants because of the potential for violence or retaliation which could be directed against all Haitians connected with the migrants. We believe that releasing the names of Haitian migrants would endanger the lives and safety of non-migrant Haitians. There was no way to guarantee the safety of the migrants' relatives and friends in either the United States or in Haiti from such retaliation. For this reason, we agreed that for the safety of the migrants, their families and friends that the names should not be disclosed.

. . .

11. Since the original decision was made not to release Haitian migrant names, the issue has been reconsidered several times because of continuing inquiries from, among others, the media, various community organizations, and members of the public. Our conclusions concerning the threat of retaliation and concern for the Haitians' safety remain. Therefore, we have not changed our original decision. Additionally, we cannot release the names of the Haitian migrants who have returned to Haiti because we are unable to obtain their consent since they are no longer at GTMO.

. . .

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of November, 1994.

/s / Kenneth Leutbecker
Kenneth Leutbecker
Associate Director
Office of Immigration and
Refugee Affairs
Community Relations Service
U.S. Department of Justice

Appendix M

Excerpts From
Declaration of Colonel Michael A. Pearson,
Commander, Haitian
Operations, Guantanamo Bay
November 3, 1994

24. Administrative segregation is conducted in accordance with the rules and procedures promulgated by Commander, Joint Task Force 160 dated 11 October 1994. My personal approval is required before a Haitian migrant can be placed in administrative segregation for a period in excess of 30 days. Thus far, no Haitian migrant has been placed in administrative segregation indefinitely and only one Haitian migrant has been in administrative segregation for over 30 days and that migrant is now in pretrial confiinement in Charleston, South Carolina awaiting trial for the rape of a 6 year old migrant girl.

. . .

26. The principle that has guided this operation since Cubans joined our GTMO "migrant population has been that of equal treatment. This principle is evident in absolutely every facet of the operation whether it's the distribution of donated goods or providing logistical support for camp programs. If we do it for the Cubans then we'll do it for the Haitians. . . .

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of November, 1994.

/s/ MICHAEL A. PEARSON
Colonel Michael A. Pearson

Appendix N

Excerpts From
Deposition of Jay LaRoche, Community Relations Service,
Department of Justice
December 1, 1994

Page 32:

Q. It sounds to me like from your testimony that there have been occasions where unaccompanied Haitian minors have related to CRS instances in which they have experienced traumatic experiences in Haiti.

A. In the general sense. I don't have any numbers with me, if that is what you're asking me.

Q. But there are such minors?

A. Yes. There are some minors who have expressed some very difficult traumatic situations.

Q. Other than the minor coming out on his own, his or her own, and telling you, is any further effort made to identify those minors who may have suffered traumatic situations in Haiti?

A. Usually what we would do is in the course of our operation, the routines, if minors express some concerns to us or minors act out or exhibit some behavior that perhaps would require some medical intervention, then we would look at that.

Pages 70-72:

Q. What is a house parent?

A. A house parent is a Haitian migrant or house parent. It could be a family, husband and a wife, who have a child or children and who have volunteered to care for these kids.

Q. Are they given any specialized training to be house parents?

A. They are not given specialized training, but they are generally talked to about how to address the needs of those children, the unaccompanied minors.

Q. And who teaches them that?

A. CRS staff generally will talk with them in Guantanamo.

MS. DORNELL: Mr. Baruch, please let him finish his responses.

THE WITNESS: CRS staff in Guantanamo would tell them that.

BY MR. BARUCH:

Q. Is there some type of class that these house parents take?

A. Not in a formal sense of a class, but they are talked with by CRS staff explaining to them certain dos and don'ts, that they are to assist the children with their daily needs, daily activities. The house parents also are the instructors for those children during classes. The house parents assist them, which is one of the requirements that they would assist them to get up and go and eat and take their food back to the tents, assist them in taking showers, indicating to them if the clothes are dirty. These are general things that the CRS staff would talk to them about and, of course, clearly that house parents should be very understanding of the children and not push them and things of this sort.

Pages 78-79:

Q. What is the difference between a 70 year old Cuban and a 70 year old Haitian in terms of their special needs as a vulnerable group?

A. My sense is that individuals in that age bracket have the same needs.

Q. Whether or not they are Cuban or Haitian, correct?

A. I do not think that nationality has anything to do with it.

Q. And it's the same with those who have urgent medical conditions, right, nationality has nothing to do with the character of their needs; is that correct?

A. Are you asking me as a personal –

Q. I am asking based on your experience.

A. No. I do not think that there is a difference.

Q. And there's nothing to distinguish the special needs of an unaccompanied minor whether they be Cuban or Haitian; isn't that correct?

A. That is correct. I don't know if I should attempt to clarify something here.

Q. If you feel the need.

Page 91:

Q. In your opinion, having had vast experience with children, refugee children and unaccompanied minors, what is the adequacy of the education that is provided by the migrants in the camps to their children?

A. We understand that this is basic general education. This is not something that is really structured to provide specific education in specific areas at different levels. It just provides some general education just to keep them occupied and give them something to do.

Appendix O

Excerpts From
Deposition of Kenneth Leutbecker, Associate Director for the Office of Immigration and Refugee Affairs, Community Relations Service, Department of Justice
December 2, 1994

Page 67:

Q. Have you taken any steps to ensure that relatives and friends in Haiti could know whether or not the refugees are, in fact, alive or dead?

A. No.

Q. Would you deem these phone calling and postcard systems as steps to ensure that?

A. To ensure what?

Pages 97-98:

Q. How many resources would be required to accumulate the waivers?

A. I do not know.

MR. PAZAR: For how many people?

MR. ABENSOHN: The waivers for 6,000 Haitians.

MS. BYRD: When you use the word "resources," Counsel, what are you referring to?

MR. ABENSOHN: Whatever resources he is referring to himself in terms of how the department would be stretched thin.

THE WITNESS: I don't know. I mean, I haven't given it any consideration.

BY MR. ABENSOHN:

Q. So you haven't considered it in any quantified way; is that correct?

A. Correct.

Q. You at no time addressed the issue of how much more work and personnel would be needed to accomplish this?

A. I don't know what the process would be, so I can't speculate on what resources are going to be necessary.

Pages 110-11:

Q. As I understand your affidavit, there were logistical and security concerns that prompted the decision not to release the Haitian names; is that right?

A. Yes.

Q. In the eighth paragraph of your affidavit, you say, "There was no way to guarantee the safety of the migrants' relatives and friends in either the United States or in Haiti from such retaliation." Was there any way to guarantee the safety of the relatives and friends of the Cubans whose names had been released?

A. I don't know.

Q. And in the eleventh paragraph of your affidavit you say that, "Our conclusions concerning the threat of retaliation and concern for the Haitians' safety remain." What are the continuing threats to Haitian safety?

A. The last time I visited this issue substantively was late October, and I have not since.

Pages 207-08:

Q. There is a standing objection as to our use of the word "detention." Can you tell me why you do not perceive there to be detention in Guantanamo?

A. My understanding of detention is when people are apprehended upon entering the United States and detained in the illegal custody of the Immigration and Naturalization Service, and that is not the case at Guantanamo.

Q. Are you aware that the camps are surrounded by barbed wire and patrolled by armed security?

A. Yes.

Appendix P

Excerpts From
Deposition of Brunson McKinley, Deputy Assistant Secretary of State for Population, Migration, and Refugees
November 29, 1994

Page 119:

Q. Are you aware of any recent reports of violence directed at Aristide supporters or pro-democracy supporters in Haiti?

A. I am trying to think of specific recent instances and by recent you mean since mid-September, when the intervention occurred?

Q. Let's start by that.

A. I am searching my memory for a particular instance and nothing comes to me, although I have heard that in parts of the countryside there is still trouble and agitation and the possibility of political pressures, persecution.

Q. And by countryside, you mean rural areas of Haiti?

A. Yes.

Page 125:

Q. You don't know one way or another whether the Haitians at Guantanamo are refugees?

A. That's right, because we have never put them to the test.

Q. And in your position as Deputy Secretary of State with responsibility for migrants, refugees and population, it doesn't matter to you whether the Haitians detained at Guantanamo are refugees?

A. That is right. It doesn't matter to the safe haven policy. We have adopted a policy which gives equal protection to all comers who want it. That is what safe haven is.

Page 146:

Q. Once the policy was implemented, was there some procedure in place to screen the Haitians that were fleeing from Haiti, in order to determine whether they qualified for safe haven status?

A. When they were brought to Guantanamo, they were interviewed and asked whether they wanted safe haven. There were also some questions put to them to try to determine whether they might be excludable. That is, they might be guilty of crimes or otherwise not qualified under international standards.

Q. Who were they interviewed by?

A. It was an INS responsibility. INS worked closely with UNHCR that was present in an advisory capacity, and with IOM, which was the organization that hired the interpreters. So IOM --

Q. What is that?

A. International Organization for Migration. They were the ones who, in Kingston and then afterwards at Guantanamo, had hired the interpreters. So all of those organizations were involved in the process.

Page 149-50:

Q. Now, with respect to current policy with respect to those Haitians on Guantanamo, is it the current policy to maintain safe haven status for the Haitians as long as they desire to have safe haven?

A. Yes. We haven't changed the policy. You have your choice of safe haven or return.

Q. And that safe haven status can be continued indefinitely at the request of the Haitians?

A. Well, I would say not necessarily. That depends on the future. Safe haven is designed as a form of temporary protection. It is not thought of as something that would last forever.

Q. What is the genesis of the term "safe haven," in this case, in connection with the policy toward the Cubans and Haitians on Guantanamo? Does it arise from this suggestion by the UNHCR of conferring safe haven status?

A. Yes.

Q. Or is it some other?

A. No. That is it. Safe haven is a term of art, a form of protection that is offered to people who are fleeing a country which is troubled, civil war, violence, human rights abuses. It is a very frequent form of protection that is offered to people who believe they have to take flight.

Appendix Q

Excerpts From
Deposition of Stewart Moneymaker, Former Deputy Staff Judge Advocate General, United States Naval Base, Guantanamo Bay, Cuba
November 22, 1994

Pages 22-23:

Q. Do you know on what basis it was made to discriminate against the Lutheran Immigration and Refugee Service, the Church World Service Immigration and Refugee program and the U.S. Committee for Refugees as opposed to Amnesty International in conferring the one-on-one interview privilege with camp detainees?

MR. HOWARD: Objection to the word "discriminate."

BY MR. DIAZ:

Q. You can answer?

A. Can you restate it?

(The reporter read the requested portion of the record.)

BY MR. DIAZ:

Q. Do you know on what basis the decision was made to discriminate against the Lutheran Immigration and Refugee Service, the Church World Service Immigration and Refugee Program, and the U.S. Committee for Refugees versus Amnesty International in granting the one-on-one interview privilege?

A. It was actually the reverse. The procedure used for the Lutheran, the Church World Service and the U.S. Committee for Refugees was the standard access. The decision to allow an Amnesty International team to have one-on-one interviews was the exception to the rule.

Q. My question still stands. Do you know why the decision was made to discriminate in favor of Amnesty International in granting them the one-on-one interview privilege?

A. Yes. It was — my understanding was that it was determined that Amnesty International was a well-recognized organization that had a particular purpose — they were an excellent vehicle for the Joint Task Force to continue with our open and transparent policy with regard to the operations. The Amnesty International is world reknown. They are world-respected. It was to the benefit of the operation to allow them additional access and be able to report. We were able to grant that particular access because we had made arrangements for operational security such that the extra access they were granted was done on a limited basis. They were at one particular part of the installation that was well secured. There was a limited number of migrants in this particular facility, so the ability to safeguard both the migrant population and the Amnesty International people during the one-on-one interview process was improved. So combining those together, we were told by our headquarters, "Okay, this is a change, let Amnesty International have one-on-one interviews, they can report on the operation as they always did," and we did it.

Appendix R

Excerpts From
Deposition of Michael Skol, Principal Deputy Assistant
Secretary of State for Inter-American Affairs
December 1, 1994

Pages 51-52:

Q. My question then is: What information do you know for a fact that the Haitians on Guantanamo have access to regarding conditions in Haiti?

A. I know as a fact that they have access to the type of description of what has happened in Haiti, what the situation is on the ground today, that is, in my opinion, sufficient to make a reasonable judgment that return to Haiti is justified.

Q. You say they have access to — I think your words were the type of description of the situation in Haiti. What do you mean? What information do you know for a fact is getting to the Haitians on Guantanamo regarding conditions in Haiti?

A. That President Aristide has returned. That by all judgment, he is conducting himself and his new government is conducting itself in all appropriate human ways. That the levels of violence have decreased dramatically since his return. That human rights violations have all but disappeared. That the process of government, the movement toward elections, the entire process of making Haiti a decent place to live, both politically and economically, is well under way. And, for a fact, I know that that kind of information is available to the Haitians in Guantanamo.

Pages 69-71:

Q. As a multinational force that intervened in Haiti in September, have they fanned out throughout Haiti and do they occupy — strike that. Let me start over. The multinational force that intervened in Haiti in September, do you know whether they are regularly patrolling all of the rural areas of Haiti?

A. All of the rural areas, no. They have visited a large number of areas. The combination of the international police monitors, the members of the multinational force and of the vetted police personnel of the Haitian government, are conducting this kind of fanning out. But it would be impossible to say that the multinational force is patrolling all rural areas.

Q. In your declaration in paragraph 6, you state, "U.S. Special Forces have visited nearly 500 towns in the countryside and are in place at 27 sites outside the capital." What do you mean in that statement by the term "visited"?

A. They have been there and they are not necessarily permanently — they are not permanently stationed in all 500 towns in the countryside.

Q. They are permanently stationed in 27?

A. They are in place for the next period of time and stationed at the moment at 27 sites.

Q. Do you know how many towns there are in Haiti?

A. No, I do not.

Q. Do you have any idea at all whether the 500 towns would include all of the towns in Haiti?

A. I frankly do not know, but I have to assume that it's a large portion, a significant portion of the towns of any size in Haiti.

Page 76:

Q. Can you tell me, Ambassador, what progress has been made in the vetting, what percentage of those who have been identified as having demonstrably unacceptable human rights reputations have been removed?

A. I cannot give you a percentage. It is a process that is ongoing. We are satisfied with the progress that has been made so far and are confident that it will continue.

Q. Can you give me a ballpark? Are there hundreds of people who have demonstrably unacceptable human rights records who remain as a member of FAd'H today?

A. I cannot give you a figure.

Q. You can't quantify it in any way?

A. No.

Q. It could be 1,000?

A. I simply don't know.

Pages 90-91:

Q. Were you also planning on dismantling the camps? Is that part of your plan?

A. The fact is that since the situation has changed in Haiti and has not changed in Cuba, one of the assumptions is that when camp facilities are empty, let's say in Guantanamo, then the best of the facilities would be used, if open, for the remaining refugees. For the Cubans who came second to the Guantanamo area, the area where the Haitians are now may prove to be a better area for some of the Cuban migrants to be settled in.

Q. Do you know if the government is actively encouraging Haitians to return to Haiti?

A. We are providing the information which we assume will give them the basis on which to decide voluntarily to return to Haiti.

Q. Are you familiar with the term PSYCH/OPS?

A. Yes, I am.

Q. And you are aware that that is a term used to refer to personnel from the United States Army or other services who engage in psychological operations?

A. Yes.

Pages 149-152:

Q. The policies, or the variation and the change and the shift in Cuban policy that you are referencing relates to the ability of Cubans to leave, do you have knowledge of or are you aware of whether the policy has changed as it relates to Cubans returning to Cuba who have fled Cuba?

A. As far as we know the people who voluntarily return to Cuba, having originally fled, are not being prosecuted or otherwise harassed by the Cuban government for having violated the law still on the books against unauthorized departure.

Q. What is the basis of that acknowledge? [sic]

A. We have heard no complaints. We have had no evidence that would indicate that the situation is otherwise.

Q. When you indicate that you have heard no complaints, do you have a mechanism in Cuba by which you receive complaints of people who have been persecuted by the government for various reasons?

A. It is not a formal mechanism, but we are automatically a recipient of people who one way or another want to complain to let the outside world know what is happening. This can happen in various ways, including people directly communicating with us in Havanna, or through intermediaries such as family in the Miami area or elsewhere in the United States or in the world.

Our knowledge is not complete, but our awareness of human rights and other violations of harassment that goes on in Cuba is well documented and we are confident that we know an awful lot and we are privy to an awful lot of what does, in fact, go on in Cuba in the area of human rights violations and repression of other sorts by the Cuban government.

Q. Are you saying then that you would hear of or that you would know of any reprisals taken against returning Cubans who have voluntarily repatriated to Cuba?

A. I cannot be categoric about our necessarily knowing about everything that might or that does happen. But we have heard nothing and we are fairly confident that we would likely hear if this was a pattern.

Q. How many people approximately do you know of that have been repatriated back to Cuba from Guantanamo?

And, for the record, when I refer to Guantanamo, I am referring in general to both the detention camps at Guantanamo and elsewhere, such as in the Panama Canal zone.

A. I don't have the exact figure, but it is in the neighborhood of, I believe, 100 — it's under 200.

Q. The relative proportion then of people who have gone back is significantly small in relation to the number that are still at Guantanamo?

A. Yes.

Q. In general in society do you have any information as to how people who are returned, people who return from other countries back to Cuba, how they are treated in society?

Pages 304-05:

Q. You have not heard about the decapitation of the mayor in that town recently?

A. I do not recall.

Q. Is it possible that there have been human rights abuses in these areas that were not brought to your attention?

A. Human rights — individual human rights abuses are not individually brought to my attention. So the answer, of course, is yes.

Q. I am not sure I understand why you would not expect that human rights violations in these areas to be brought to your attention.

A. The general situation, the level of human rights violations or respect for human rights, is regularly brought to my attention.

Q. But only in a general sense, not with reference to specifics?

A. Yes.

Q. So although you are satisfied that things are generally good in Haiti and you do not know the particulars of what areas are safe and what areas are unsafe; is that right?

A. I'm quite satisfied with those people who are reporting within the U.S. Government the status of human rights throughout Haiti are doing so honestly and accurately.

Appendix S

Excerpts From
Deposition of Ronald Zaperach, Former Current Operations Officer, United States Naval Base, Guantanamo Bay, Cuba
November 22, 1994

Page 56:

Q. Other than the World Relief Organization, do you know the names of any of the other Non-Governmental Organizations that were afforded long-term access — strike that. Other than the World Relief Organization, do you know of the names of any of the other Non-Governmental Organizations that have been afforded long-term access to the Guantanamo Bay facilities by the United States Government?

A. World Relief is the only one I am aware of.

Q. By your response, you didn't mean to suggest that there might not be others that you are not aware of?

A. There could be. I am only aware of the World Relief ones.

Q. Did you process those requests for long-term access?

A. For the World Relief people, yes, sir.

Appendix T

Letter from Seth Waxman,
Office of the Deputy Attorney General,
To Roberto Martinez and Ira J. Kurzban, December 2, 1994

Dear Messrs. Martinez and Kurzban:

In light of the District Court's November 22 and 28 orders granting counsel for provisional intervenors reasonable and meaningful access to certain eligible migrants, it is necessary to establish a protocol for access by attorneys for both groups. To guarantee fair access to the limited resources at Guantanamo Bay Naval Base, the following procedures have been developed, consistent with the Principles of Access previously filed with the Court. Requests for access not consistent with these procedures likely will be declined.

To ensure that attorneys from both groups obtain reasonable and meaningful access consistent with the base's limited facilities and personnel, attorneys for plaintiffs and provisional intervenors will be granted visiting time on alternate weeks. For example, attorneys for the Cuban migrants are scheduled to visit Guantanamo Bay during the week of November 28, 1994. Attorneys for the Haitian migrants, therefore, will have access to the base during the week of December 5, 1994. This arrangement will remain in effect until such time as one group of attorneys has met privately with each individual who has requested such a meeting in writing, or until such time as counsel for the two groups establish an alternate time-sharing arrangement consistent with the following parameters, or until a court decision no longer requires the government to provide access to Guantanamo.

1. All attorney visits will last for no longer than three (3) consecutive days (although attorneys may arrive the evening before the first day of visiting). No more than six (6) attorneys representing one group of plaintiffs (*i.e.* Cubans or Haitians) — will be permitted to visit the base during any given week.

2. To obtain theater and country clearance onto the base, at lease five (5) working days before the desired arrival each attorney must provide Lieutenant Colonel Robert Hudson (or other contact we may designate in the future), at (703) 693-9848, with his or her name, organization, Social Security number or passport number, and dates of proposed arrival and departure.

3. Attorneys must make their own commercial air travel arrangements and, at least two (2) working days prior to arrival, provide Lieutenant Colonel Hudson with the airtime, flight number, and time of arrival and departure. Attorneys will be met at the airfield by local Guantanamo personnel.

4. In order to expedite attorneys' private visits, at least two (2) full working days before arrival each group of attorneys must provide Lieutenant Colonel Hudson with the names of those migrants with whom they wish to speak (and who have requested in writing individual representation). Failure to provide this notice in a timely fashion will likely result in delay or inability to locate and provide access to eligible individuals during the attorneys' visit to the base.

If you have any questions concerning the foregoing, feel free to contact David Kline at the address listed in the pleadings or at (202) 616-4904. Because this matter is under court order, all communications regarding the terms of access (other than routine communications on matters listed in the numbered paragraphs above) should be directed to Mr. Kline or, if they arise during the course of a visit to Guantanamo, to the Department of Justice personnel there.

Yours sincerely,

/S/ SETH P. WAXMAN
Seth P. Waxman

Appendix U

Beheading Sows Terror In Rural Haiti,
Miami Herald, November 19, 1994

By: ASSOCIATED PRESS

MIREBALAIS, Haiti - Someone chopped off the head of Deputy Mayor Cadet Damzal just over a week ago and the murder is sowing confusion and fear among those who would build democracy in Haiti.

Damzal, like many other supporters of democracy in Haiti's central plateau, had only recently ventured out of hiding, encouraged by the presence of U.S. troops and the return from exile of President Jean-Bertrand Aristide

News of the slaying spread a message across the country: Even the U.S. Special Forces can't guarantee safety in Haiti's remote rural communities, long dominated by military commanders and armed civilians known as attaches.

Hundreds of townspeople turned out for Damzal's funeral Sunday. A school band played a dirge as pallbearers carried the casket from the funeral home to the Bethel Haiti Church of God and then to the cemetery.

"We're here to salute a valiant man who was assassinated in a cowardly manner," said Lexander Dorilas, 30, an Aristide activist.

Evangelical Pastor Pierre Jean-Baptiste called for an end to the violence. "The time has come for leaders of the country to assume their responsibilities and take action so that henceforth these acts of violence and banditry stop," he said.

The Aristide government has ordered an investigation. "By killing Damzal, they want to kill what he represented," Mayor Paul Yvelt Millien said on the eve of the funeral.

Millien was among 300,000 pro-Aristide Haitians who went into hiding during much of the president's three-year exile, said the

killers want to intimidate popular pro-democracy leaders who plan to seek public office in next year's elections.

Millien, 33, is certain his deputy was slain by the same paramilitary thugs who terrorized Haiti after Aristide was ousted. The thugs are blamed for at least 3,000 political murders.

An American flag flies over the old yellow army barracks facing the main square in this market town, separated by 40 miles of tortuous road from Port-au-Prince to the south. Nearly every home is decorated with Aristide posters, something not permitted under military rule.

Damzal's beheading was the most brutal example of the continued violence against Aristide supporters in isolated regions of the country. Supporters worry that violance may escalate once the American troops depart.

Damzal was ambushed the night of Nov. 4 as he walked home. His headless body was plucked from a river the next day by Special Forces soldiers who have occupied the town's regional army garrison since early October.

"It was ghastly," said Capt. Tim Baxter, 33, of Menominee, Mich. He said Damzal's arms had machete cuts indicating he tried to fend off the blows.

Damzal's eldest son, Claude, 26, believes his own life is in danger, because he was active in pro Aristide politics with his father.

"Once the funeral is over, I won't be safe," he said. "I'll have to lay low. I'm responsible for the family and they have to go to school and eat."

Millien, the mayor, said quick justice was necessary. "Otherwise, when the Americans' time is up and the troops leave, they are going to leave us in the hands of the criminals."

U.S. troops provide some security by patrolling the streets, but they have failed to disarm the population, Millien said.

The 23 American soldiers stationed at the Mirebalais army garrison patrol the region, but are under orders to intervene only when absolutely necessary.

Millien wanted to display Damzal's headless body in an open casket at the funeral. The family was not in agreement.

"I wanted the people to see how evil these people are. I wanted them to see a man buried without a head," he said.

Appendix V

Excerpts From
2 Slain by Attachés on Aristide's First Full Day Back,
New York Times, October 17, 1994

By Larry Rohter

PORT-AU-PRINCE, Haiti, Oct. 16

At least two people were beaten and hacked to death here today when paramilitary auxiliaries opposed to President Jean-Bertrand Aristide attacked some of his supporters who had just emerged from hiding.

The incident marred the first full day of Father Aristide's second turn as President of Haiti, which he spent quietly and in privacy as his allies took to the pulpit to preach the reconciliation and justice he has promised will be the hallmark of the rest of his term of office.

The two men killed in the midday attack in Cite Soleil, a sprawling slum that is a pro-Aristide stronghold, were identified by neighbors as supporters of Father Aristide who had just returned to the capital after months spent underground. They were said to be helping American soldiers who were trying to identify and detain a pair of paramilitary gunmen, known as attaches, loyal to the military dictatorship that ruled Haiti until Saturday.

American forces were not present during the attack, but returned to the area several hours later to remove the bodies, residents said. One victim appeared to have been beaten to death with a club, while the other had been slashed with a machete. American soldiers said two other people might also have been killed in the area today, but offered no further information.

Tonight, in another demonstration of the volatility here, several thousand people converged on the National Palace, responding to rumors of an assassination attempt against Father Aristide by

the new Armed Forces commander in chief, Maj. Gen. Jean-Claude Duperval.

American officials and advisers to Father Aristide said the rumors stemmed from an incident at the palace, when General Duperval arrived for a meeting with Father Aristide late this afternoon. The general and his four-wheel drive vehicle were searched, and weapons were found and confiscated, but General Duperval was not arrested and the meeting went ahead as scheduled, the officials said.

American officials said a sidearm was taken from General Duperval and returned to him when he left the palace. But the Aristide advisers said that grenades and a grenade launcher were also seized, and that those weapons were not returned.

Radio accounts of the incident drew pro-Aristide forces into the streets. Demonstrators, armed with clubs, sticks, machetes and rocks, set up roadblocks to stop cars and search them for weapons. The crowds dispersed at around 9:30 P.M., after American military vehicles mounted with loudspeakers drove through the streets broadcasting assurances that all was well.

. . .

Appendix W

Excerpts From
Grenade Kills 5 In Haitian Crowd,
Washington Post, September 30, 1994

By: Douglas Farah, William Booth,
Washington Post Foreign Service

PORT-AU-PRINCE, Haiti, Sept. 29, 1994

A hand grenade exploded today in the middle of a jubilant throng marching to show support for president Jean-Bertrand Aristide and his allies, killing at least five people and wounding 47.

The killings, believed caused by Aristide's opponents in the Haitian military and their paramilitary partners, marked the bloodiest violence in the Haitian capital since U.S. troops arrived Sept. 19 to prepare the way for Aristide's resumption of power after three years in Washington exile.

Heavily armed U.S. troops in humvees swiftly took up positions around a warehouse from whose roof the grenade was reportedly thrown. The Americans used M-16 automatic rifles to shoot into the warehouse and also fired .30-caliber machine guns mounted on their vehicles at unknown targets.

The incident left no American casualties, said Col. Barry Willey, the U.S. Army spokesman in Port-au-Prince. Three Haitian men were later seen being taken into custody by the American troops.

The assailants' identities were not immediately known, but the warehouse belongs to Lt. Col. Michel Francois, the Port-au-Prince police chief and one of Aristide's staunchest opponents. Francois led the coup d'etat that overthrew Aristide in September 1991 and commands the notorious "attaches," plainclothes gunmen who have acted as enforcers for the military junta that has ruled Haiti since Aristide was driven out.

"I think it is clear the world can now see the face of evil that has plagued this country for so many years," said U.S. Embassy spokesman Stan Schrager.

Today's violence highlighted the deep polarization here and the difficulty of the U.S. military mission, which is being called upon to maintain law and order in a society undergoing a profound transformation. It took place just hours after Evans Paul, the mayor of Port-au-Prince who was driven from office in the coup three years ago, reopened City Hall under heavy protection of U.S. troops and amid widespread celebration. Paul is one of the most popular figures in Haiti and a resilient Aristide ally.

The marchers hit by the grenade were continuing their joyous, pro-Paul celebration about a mile from City Hall in a slum in the western part of the capital. A U.S. patrol had passed by minutes before the grenade exploded but was not nearby when the blast rang out. The U.S. troops quickly returned after the explosion.

. . .

Appendix X

Briefing Paper of Human Rights Watch/Americas:
Human Rights Concerns in Haiti
December 8, 1994

The US-led September 19 multinational intervention in Haiti brought to a halt the worst military and paramilitary sponsored human rights abuses -- the killings, torture and rape that had been occurring on a daily basis. But although President Aristide has returned and the old military leadership under Gen. Raoul Cédras has been dispersed and disabled, there is a real danger that grave abuses could resume and even imperil the newly established constitutional government -- especially if Haiti's vicious paramilitary networks are not disarmed and dismantled. Although the Aristide government is slowly laying the groundwork for a civilian controlled police force, a scaled-back army and a functioning judiciary, it has neither the resources to carry out security functions itself nor the ability to sway the multinational forces (MNF) on such issues as the need for sweeping disarmament. This paper provides a brief overview of the current human rights situation and related issues that have medium and long-term consequences for democratization and establishing the rule of law. It also points up continuing security concerns that render unwise or at least premature, any blanket rejection of Haitian political asylum claims based on improved conditions in Haiti.

The most pressing security and human rights concerns in Haiti today are: the small number of weapons recovered from the army and civilian sources compared to the quantity of automatic weapons at large; the ill-defined detention policy that has led to the release of hundreds of suspected attachés and army criminals detained by the multinational forces (MNF), while petty thieves or Aristide supporters are kept in prison; reliance on the Haitian military to make up the interim police force; significant instances of inappropriate collaboration between MNF and Haitian civilian and military sectors allied to the old

coup regime, and failure to preserve information that may constitute evidence against abusive military and civilian attachés. In addition, rural areas, where 70% of the population lives, have been virtually unattended to; only some 800 MNF are actually deployed outside of Haiti's two largest cities. Although rural section chiefs were officially dismissed in late October, there is no plan for law enforcement in the countryside. Cases of serious human rights violations in different parts of the country underscore these concerns.

Inadequate disarmament of Haiti's paramilitary forces

Nobody knows how many weapons remain in the hands of the army, FRAPH (Front for the Advancement and Progress of Haiti, the chief paramilitary group) and other military supporters. Fewer than 6,000 weapons have been recovered from non-army sources, as well 8,000 from the military, many of them in poor or non-working condition. Weapons searches were largely suspended by the MNF after Aristide's return. US military leaders say that order has been restored to the country. Yet most Haitians believe that large numbers of guns remain in the hands -- or rather buried in backyard caches -- of groups like FRAPH and the "Ninjas," Cédras' ad hoc elite bodyguards. President Aristide and UN officials have urged the MNF to continue disarmament efforts. The US forces complain that tips provided by most Haitians fail to produce results, so they've stopped looking. But the most successful finds have come from informers who were themselves part of the paramilitary network. What is being done to encourage such informers? Although US embassy officials claim to have extensive intelligence on FRAPH, they have shown an inexplicable reluctance to dismantle its paramilitary structures. Local Haitian military commanders distributed weapons to civilians during the last year and undoubtedly know where the guns are. Are US officials applying appropriate "carrots and sticks" to encourage military officers to reveal weapons caches?

Inconsistent policy on detention of suspected criminals

The MNF is following no consistent or clearly defined policy in detaining or releasing from detention, Haitians accused of serious crimes. The MNF has detained more than 200 alleged paramilitary agents and abusive military, most of whom were arrested by citizens and turned over to them. The majority of these appear to have been released without any legal proceedings. In early November, the MNF was holding approximately forty Haitians, including several notorious criminals considered a risk to the MNF, ostensibly under the authority of Security Council Resolution 940. By early December, half of these had been released, also apparently in the absence of legal proceedings. On November 23, Max Paul, the former head of the port authority, was released from MNF detention, and Romeo Halloum, a Cédras associate, was also reportedly released. At the same time, Emmanuel "Toto" Constant, the leader of FRAPH, the paramilitary group responsible for more killings, disappearances and torture than any other, remains at large and in contact with the US embassy, after making a conciliatory speech. US officials in Haiti respond with shrugs and red faces when asked to explain the discrepancy.

In Cap Haitien, human rights monitors witnessed Corporal Joseph "Magloire" Clemeus being seized by a crowd and beaten on October 30 after he was recognized trying to board a bus to Port-au-Prince. Human rights activists in Cap Haitien charged him with the unprovoked shooting death of two young men eating in a restaurant on election day, November 29, 1987, as well as numerous brutalities during the last three years. Clemeus was rescued by the MNF and later released with no further proceedings. During the same weekend, MNF forces in Cap Haitien arrested more than ten alleged petty criminals. These individuals charged with drug dealing, prostitution, car theft and the like, were brought to court by MNF soldiers on October 31, where their cases were heard.

Guidelines governing MNF detentions and release from detention need to be clearly articulated and follow Haitian and international guidelines regarding due process. Individuals sus-

pected of grave abuses should be arrested, or detained after citizens' arrest, and then presented to judicial authorities to determine if there is sufficient evidence of involvement in serious crime to hold them for trial. The MNF should make every effort to gather and preserve testimony regarding alleged criminals brought to its attention, by questioning them, taking testimony from their accusers, and placing this information, as well as the accused, immediately in the hands of the appropriate legal authorities.

Lack of attention to prisons under Haitian military control

There has been no regular supervision of prisons under the control of Haitian military and several hundred prisoners escaped from the main prison in Cap Haitien on September 24. Another 308 fled the National Penitentiary in Port-au-Prince on October 14-15, and 134 escaped on October 30. While some of these people were undoubtedly imprisoned unjustly, others were condemned criminals or military and attaches arrested since the return of President Aristide. All but a few are still at large.

MNF collaboration in repressive actions

In several parts of the country US Special Forces troops, whether willfully or out of ignorance, have established overly collaborative relationships with the Haitian army. They have resisted communities attempts to be rid of abusive officers, and have accompanied Haitian military on arrests or attempted arrests of pro-democracy activists and searches of their homes.

*In Jérémie, the capitol of the Grande Anse department, the public prosecutor is a member of FRAPH and uses his position to serve warrants on *Lavalas* supporters while ignoring complaints filed by pro-Aristide community members. The MNF assists the Haitian military in serving these warrants, most of them baseless. For instance, the MNF helped arrest four Aristide supporters, including a 74-year-old man, in the Fond Berke neighborhood of Jérémie on October 31. In neighboring Chambellan, MNF collaborating with Jérémie-based Haitian military arbitrarily arrested sixteen people on November 3,

based on a complaint by a FRAPH member. Charged with disorder during a November 2 demonstration, nine of the group were not freed until November 9. On November 24, MNF accompanied Haitian army in the arrest of Father Joachim Samedi, an outspoken supporter of President Aristide.

*In Grand Gôave on November 11, MNF accompanied Haitian soldiers on searches of two houses of members of the popular organization Kombit Komilfo, and tried to serve arrest warrants on three members. The signatures on the warrants were discovered to have been forged by the court clerk in collaboration with the army. Earlier, for many weeks, MNF supported Lieutenant Joseph Weber Milord, the Grand Gôave commander and a FRAPH leader, against community efforts to have him dismissed.

Failure to preserve documents discovered in military posts that may constitute evidence

Monitors have observed hundred of forms, letters, arrest warrants and other documents lying scattered around the floor of military posts in Cap Haitien and Cabaret. In many other areas, the documents had all been removed or destroyed, whether by the military themselves or noncomprehending citizens. At one military post jointly occupied by Special Forces and army, the US commander admitted to us that as part of his efforts to clean up the base, he had ordered Haitian soldiers to trash and burn a roomful of old documents. All such documentation should be preserved because it may contain evidence about human rights violations that would aid the Truth Commission in its work and make possible future prosecutions.

Reliance on the Haitian military as interim police force

The decision to create an interim Public Security Force (IPSF) composed of half of the Haitian army, screened by a military commission, threatens to leave Haiti with a force mistrusted by the population and capable of continuing brutalities. The Haitian government plans to open a police academy in January 1995 which will offer a four-month course to successive

groups of 400 new recruits but it will be at least a year before the academy's graduates can replace the IPSF. The 3,000 IPSF members are drawn entirely from the ranks of the army, screened by a commission of four colonels headed by commander-in-chief General Bernardin Poisson and by the US embassy, based on lists of alleged human rights abusers and criminal suspects. However, the essential components of citizen input and investigative procedures are absent. Programmed neighborhood investigations by the colonels' commission of soldiers' reputations are rendered ineffective by widescale transfers of soldiers around the country since October. At several army barracks visited by human rights monitors, from one quarter to one third of the soldiers had been transferred within the last month. The recruitment of more than 1,000 Haitian refugees on Guantanamo was an innovative response to the need for an interim security force, however the decision to utilize the refugees as police auxiliaries, subordinating them to the soldiers, negates much of the positive aspect of the project. The recycled army are unpopular, as was shown by the reaction of the Cap Haitien population to the attempted redeployment of soldiers as IPSF. Alarmingly, US officials expect that most of the interim police will be absorbed either as prime candidates for the new civilian police force or as part of a reformed army.

Ongoing violence

Although violent human rights abuse has declined since the multinational operation began, a number of cases are worth citing:

*At least one and possibly four persons were killed in Carrefour Rocher, Chenot, a communal section of Marehand Dessalines, on October 9. Human rights groups reported that Section Chief Onondieu Paul opened fire on a pro-Aristide demonstration, wounding several people, and then finishing them off with a machete. Olius Cenoble was confirmed killed. A fifth person, an attaché, was reportedly killed in retaliation.

*Three civilians and two soldiers died in a confrontation October 12 in Montagne Terrible, a communal section of Saut

d'Lau. Two soldiers from Saut d'Eau, Louisant Semelis and Antenor Jean-Colin, reportedly were serving an arrest warrant on some Aristide supporters and were met by a hostile crowd. Several civilians were badly wounded and one of them, Louis Edner, died of tetanus in the Port-au-Prince State University Hospital on October 24.

*In Anse d'Hainault on October 15, soldiers under the orders of Lieutenant Lom fired at pro-Aristide demonstrators, killing Klarenase Brunache, 15.

*Lieutenant Joseph Mesadieu Pierre, the commander of the army post in Cabaret, opened fire on a crowd of pro-Aristide demonstrators October 15, killing Smith Jean, 22, and wounding a 15-year-old girl.

*The second deputy mayor of Mirebalais, Darnzal Cadet, was killed during the night of November 4. His decapitated body was discovered November 5 in a river outside the town. To date, despite investigation by the MNF, responsibility has not been determined. Darnzal Cadet represented the FNCD, Aristide's electoral coalition, and recently had been assisting victims of abuse to file suits seeking judgments and compensation.

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No. 94-1611

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In the Supreme Court of the United States

OCTOBER TERM, 1994

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v.

WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Attorney General was required to parole into the United States unaccompanied Haitian minors on the United States Naval Base at Guantanamo Bay, Cuba, to the same extent that unaccompanied Cuban minors on the Naval Base were granted parole.

2. Whether petitioner Haitian Refugee Center, Inc., and its counsel have a First Amendment right to obtain access to the United States Naval Base at Guantanamo to meet with Haitian migrants.

3. Whether the federal government is constitutionally required to provide to petitioner Haitian Refugee Center a list of the names of all Haitian migrants on the United States Naval Base at Guantanamo.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1611

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v.

WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 43 F.3d 1412. The orders of the district court (Pet. App. 32a-33a, 34a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1995. The petition for a writ of certiorari was filed on March 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioners state (Pet. 1) that the court of appeals issued its mandate "forthwith." In fact, the mandate was issued on April 27, 1995. At the time that petitioners filed the petition

STATEMENT

1. a. This case concerns Haitian and Cuban migrants located on the United States Naval Base at Guantanamo Bay, Cuba. Petitioners are a legal services organization, Haitian Refugee Center, Inc. (HRC), and several Haitian migrants located at Guantanamo. During the period that Haiti was controlled by the leaders of a military coup, thousands of Haitians took to the waters in unsafe boats. 94-5231 & 94-5234 C.A. Record Excerpts (R.E.) 158, ¶ 3. In order to save the migrants while deterring illegal immigration to this country, the United States brought more than 16,800 Haitian migrants to the Naval Base at Guantanamo. R.E. 175, ¶ 3. President Aristide, Haiti's democratically elected leader, has since been reinstalled, and a more stable and secure environment is taking root in Haiti. See R.E. 158-159, ¶¶ 4-10. Because of the dramatic change in circumstances in Haiti, virtually all of the Haitians have been returned to Haiti from Guantanamo.

b. Of the more than 6,000 Haitians at Guantanamo when this lawsuit began, we are informed by the Department of State that 362 Haitians remain. Of those remaining, 165 are unaccompanied minors (*i.e.*, 17 years old or younger). The minors are being cared for at Guantanamo by the Office of Immigration and Refugee Affairs in the Community Relations Service, a component of the Department of

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for a writ of certiorari, a suggestion for rehearing en banc (treated under the circuit rules as a request for both panel and en banc rehearing) filed by other parties to this litigation was pending before the Eleventh Circuit. The court of appeals denied rehearing and rehearing en banc on April 18, 1995. See App., *infra*, 1a-2a.

Justice. The care includes supervision, schooling, and recreational and athletic activities. See R.E. 179, ¶ 22; R.E. 165-166, ¶¶ 8-9.

We have been informed by the State Department that the procedures for determining where the unaccompanied minor Haitian children will be sent (now that the vast majority of the other Haitian migrants at Guantanamo have been returned to Haiti) are as follows: The United Nations High Commissioner for Refugees (UNHCR) is conducting a case-by-case evaluation to determine where each unaccompanied minor should be placed permanently, based on a judgment of what is in the best interests of each child. The minors are interviewed by a child protection expert employed by the UNHCR in order to obtain, *inter alia*, information concerning the whereabouts of the minor's parents and the nature of the individual's home life. That information is transmitted to a private relief organization—either the International Committee of the Red Cross or the Save the Children Foundation—which then searches for the minor's parents or guardians and examines the circumstances of the minor's home. The results of that inquiry are reported to UNHCR officials at Guantanamo, and a UNHCR child protection expert then decides whether it would be appropriate to return the minor to Haiti. The State Department has informed us that, by the end of June 1995, UNHCR evaluations should be completed for a substantial majority of the unaccompanied Haitian minors.

2. This lawsuit began on October 24, 1994, as an action by migrant Cubans located on the United States Naval Base at Guantanamo Bay, and by several Cuban legal service organizations. On October 31, 1994, petitioners sought to intervene in the law-

suit. They requested a bar on repatriation of the Haitian migrants and an order mandating that HRC be afforded access to them. Their complaint alleged, *inter alia*, that (1) the failure of the migrants to receive independent legal advice was in effect coercing them to return to Haiti, in violation of Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), and Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, R.E. 48-49, ¶¶ 78-81;[2] (2) the government had violated the First Amendment rights of HRC by denying it access to the Haitian migrants, R.E. 46-47, ¶¶ 68-70; and (3) Haitian migrants were being unlawfully subjected to less favorable treatment than Cuban migrants at Guantanamo, R.E. 50-51, ¶¶ 89-91; R.E. 52, ¶ 100. Petitioners requested an order requiring the Attorney General to "parole" into the United States the unaccompanied Haitian minors. See R.E. 50-51, ¶¶ 89-91; R.E. 59. They contended that the Attorney General's practice of paroling Cubans, but not Haitians, violated the Haitians' equal protection rights. R.E. 50-51, ¶¶ 89-91.

The district court provisionally granted petitioners intervenor status on November 2, 1994. R.E. 92. On November 22, the court issued an order that, *inter alia*, required respondents to "provide unaccompanied Haitian minors equal protection and allow them parole in the same manner allowed for unaccompanied Cuban minors" and to "release the names of

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[2] The United States adheres to Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6276, 189 U.N.T.S. 176, by virtue of the related Protocol Relating to the Status of Refugees. The United States acceded to the Protocol on November 1, 1968. 19 U.S.T. 6223, 606 U.N.T.S. 267.

all Haitian detainees at Guantanamo Bay to HRC." Pet. App. 33a. The order further required the government to grant counsel for HRC "reasonable and meaningful" access to all named Haitian migrants and any other Haitian requesting counsel. *Ibid.*[3]

3. The court of appeals dissolved the district court's preliminary injunctions and remanded with directions to dismiss petitioners' claims. Pet. App. 28a. The court held that the Naval Base at Guantanamo Bay is not located in United States territory (*id.* at 16a), and that "any statutory or constitutional claim made by the * * * individual Haitian migrants must be based upon an extraterritorial application of that statute or constitutional provision" (*id.* at 17a). Based on its own precedents and on this Court's decision in *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2557-2558 (1993), the court of appeals held that the provisions of law on which petitioners relied—8 U.S.C. 1158(a) and 1253(h), and Article 33 of the United Nations Convention Relating to the Status of Refugees—do not have extraterritorial effect, and that petitioners' claims under those provisions were therefore "untenable." Pet. App. 18a-19a.

The court of appeals also rejected the individual Haitian and Cuban migrants' contention that the

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[3] On November 23, the government filed a motion in the district court requesting the court to vacate its injunctive order or, in the alternative, to stay its order pending appeal. On November 28, the district court granted a stay pending appeal of the portions of the November 22 order pertaining to the parole of Haitian minors and the release of a list of the Haitians at Guantanamo. Pet. App. 35a-36a. But the court refused to stay its access order, and it otherwise denied the motion to vacate. *Ibid.*

Due Process Clause of the Fifth Amendment afforded them a "right to obtain and communicate with legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven." Pet. App. 20a. The court held that the migrants lacked a constitutionally protected liberty or property interest in avoiding repatriation and therefore "may not rest a claim of right of counsel and information on the due process clause." *Id.* at 21a.

The court also rejected the argument that the unaccompanied Haitian minors at Guantanamo were entitled to be granted parole on the same basis as the unaccompanied Cuban minors. The court first concluded that the Attorney General had not abused her statutory authority to grant parole under 8 U.S.C. 1182, stating that "there is little question that the Executive has the power to draw distinctions among aliens based on nationality." Pet. App. 22a (quoting *Jean* v. *Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985)). In this case, the court noted, "the Attorney General has exercised her discretion on the legitimate basis of the very different political climates in Haiti, under the newly restored democratic President Jean-Bertrand Aristide on the one hand, and in Cuba, under the regime of Fidel Castro on the other." Pet. App. 22a.

The court of appeals also concluded that the unaccompanied Haitian minors could not invoke the equal protection component of the Due Process Clause. The court relied on an earlier Eleventh Circuit decision holding that "unadmitted and excludable aliens 'cannot claim equal protection rights under the Fifth Amendment, even with regard to challenging the

Executive's exercise of its parole discretion.' " Pet. App. 23a (quoting *Jean* v. *Nelson*, 727 F.2d at 970). The court of appeals relied as well on decisions of this Court declining to give extraterritorial effect to the Fourth and Fifth Amendments. Pet. App. 24a (citing, *inter alia*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 274-275 (1990); *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950)).

The court of appeals next held that HRC lacked a First Amendment right to obtain access to the Haitian migrants at Guantanamo. Pet. App. 25a. While recognizing that lawyers have "a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression," the court stated that "[t]his right is predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant." *Ibid.* (quoting *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1513 (11th Cir.) (per curiam), cert. denied, 502 U.S. 1122 (1992)). Having rejected the Haitian migrants' underlying statutory and constitutional arguments, the court rejected HRC's First Amendment claims. Pet. App. 25a.

The court further noted that it "need not determine whether the government engaged in any viewpoint-based discrimination in denying * * * HRC access while granting humanitarian organizations access." Pet. App. 25a. The court observed, however, that "[p]roviding humanitarian organizations access to the migrants does not, without more, create a First Amendment right to that access for those humanitarian organizations or for * * * HRC." *Id.* at 25a-26a. The court concluded that "[i]f the First Amendment does not apply to the migrants or to the lawyers at Guantanamo Bay, the government cannot

be engaging in impermissible viewpoint-based discrimination by restricting association between the migrants and counsel." *Id.* at 26a. Finally, the court of appeals denied HRC's request for disclosure of the identities of the Haitian migrants at Guantanamo, explaining that there is no constitutional obligation to provide private parties with access to government information. *Id.* at 27a (citing *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9, 14 (1978) (opinion of Burger, C.J.)).

ARGUMENT

The Eleventh Circuit correctly rejected petitioners' claims, and its ruling does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioners' principal claim is that the Immigration and Nationality Act (INA) and the equal protection component of the Fifth Amendment's Due Process Clause prohibit federal officials from establishing different criteria for the parole of Cuban and Haitian migrants. That argument is without merit.

a. Petitioners contend (Pet. 13-15) that this Court's decision in *Jean* v. *Nelson*, 472 U.S. 846 (1985), bars the government from paroling Cuban minors into the United States without according the same treatment to Haitian minors. That argument lacks merit. In *Jean*, a group of excludable Haitians who had reached our shores and were detained in Florida challenged the government's refusal to release them on parole. The court of appeals rejected the challenge on the ground that the equal protection component of the Due Process Clause does not apply to excludable aliens. 727 F.2d 957, 963-975 (11th

Cir. 1984) (en banc). This Court affirmed on alternative grounds, determining that it need not reach the constitutional issue because the government had represented that the regulation at issue, 8 C.F.R. 212.5, did not permit low-level INS officials to consider race or national origin in determining eligibility for parole. 472 U.S. at 855-857.

This Court did not hold in *Jean* that the United States generally was barred from making parole decisions on the basis of the nationality of the aliens concerned. Such a holding would have represented a stark departure from past practice—reflecting the close nexus between the Nation's foreign relations and its policies concerning aliens and immigration, see *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2567 (1993) (*Sale I*)—of basing certain immigration decisions in part on the identity or character of the country of which the alien is a national. See *Jean*, 727 F.2d at 978 n.30; *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980); cf. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976).[4]

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[4] Numerous immigration statutes and regulations have included nationality-based distinctions. See, *e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 103, 104 Stat. 4985 (10,000 visas available for natives of Hong Kong); *id.* § 134, 104 Stat. 5001 (special 1,000 visas for Tibetans); Soviet Scientists Immigration Act of 1992, Pub. L. No. 102-509, 106 Stat. 3316 (special admission rules for scientists from the former Soviet Union); 8 C.F.R. 204.10 (same); Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (special adjustment rules that may be applied to Cubans paroled into the United States); 8 C.F.R. 212.1 (listing differing visa and passport requirements based on nationality); 8 C.F.R. 212.12-

Rather, this Court's decision in *Jean* was premised on the particular regulatory practice at issue in that case, which precluded low-level INS officials from exercising parole authority on the basis of race or national origin with respect to excludable aliens who had already reached our Nation's shores and were being held in detention. See 472 U.S. at 850-851, 852, 853, 855, 856, 857. The parole regulation at issue, in *Jean*, 8 C.F.R. 212.5(a) (see 472 U.S. at 850, 852, 855) speaks only to the parole of aliens who have been detained, under 8 C.F.R. 235.3, at a port of entry. None of the petitioners here fits that description. The Haitian migrants in this case are outside the United States and seek to be brought to the United States and then to be paroled into the United States once they have arrived here. The broad and discretionary authority of the Attorney General under 8 U.S.C. 1182(d)(5)(A) to parole aliens for what she deems to be "emergent reasons" or for "reasons deemed strictly in the public interest" surely encompasses the authority to take into account the respective conditions in, our policies toward, or other factors concerning, the country from which a prospective parolee has emigrated. The background of the Refugee Act of 1980, in which Section 1182 (d)(5)(A) was enacted in its current form, confirms that Congress understood that the parole power had been exercised on the basis of the country of nationality of those who would be paroled. H.R. Rep. No. 608, 96th Cong., 1st Sess. 3 (1979).

212.13 (special parole rules as to Mariel Cubans); 22 C.F.R. 43.15(b) (for fiscal years 1992-1994 no less than 40% of the 40,000 visas for adversely affected states shall be furnished to natives of Ireland).

Petitioners contend (Pet. 14-15) that the government's position in this case "disregards the Government's own admitted statement of the law" purportedly made by the Solicitor General during the oral argument in *Jean*. The colloquy at issue was as follows:

> Question: You are arguing that constitutionally you would not be inhibited from discriminating against these people on whatever ground seems appropriate. But as I understand your regulations, you are also maintaining that the regulations do not constitute any kind of discrimination against these people, and . . . your agents in the field are inhibited by your own regulations from doing what you say the Constitution would permit you to do.
>
> Solicitor General: That's correct.

Jean, 472 U.S. at 855-856 (quoting Tr. of Oral Arg. 28-29). Notably, neither the question posed nor the terse answer given refers to a statute.[5] The Solicitor General was obviously referring only to existing INS

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[5] Although the majority opinion in *Jean* refers to the restrictions placed on INS by the "statute" and regulations, see 472 U.S. at 854-855, 857, an examination of the oral argument transcript and the government's merits brief filed in this Court shows that the government's position was consistent throughout. The government repeatedly stated that both Congress and the Executive could make nationality-based distinctions by statute or regulation. It nowhere suggested (let alone conceded) that the pertinent statutes barred consideration of nationality in the Attorney General's determination of eligibility for parole. Nor was this Court's disposition of *Jean* in any way dependent upon a conclusion that the Executive Branch was barred by statute from considering nationality in its parole decisions.

regulations and practice. What he clearly meant was simply that that particular regulatory practice would not permit low-level INS officials to exercise parole authority on the basis of national origin. He said nothing to depart from the government's consistent position, outlined in the government's Supreme Court merits brief in *Jean*, that, even in the context of aliens physically detained within the United States, the government could take nationality into account in the parole discretion calculus so long as the use of such a factor was supported by a rational basis. See Brief for Respondents at 52-59, *Jean* v. *Nelson*, 472 U.S. 846 (1985) (No. 84-5240). Moreover, the parole issue in *Jean* concerned excludable aliens physically detained within the United States. That case did not involve aliens abroad. For all those reasons, this Court's decision in *Jean* in no way undermines the court of appeals' decision in this case.[6]

b. Further review also is not warranted of petitioners' claim (Pet. 25-27) that providing "safe haven" for the Haitian migrants confers upon them a constitutionally protected liberty and property interest. This Court has rejected the contention that

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[6] Petitioners also argue (Pet. 16) that the court of appeals departed from its earlier en banc ruling in *Jean* v. *Nelson*, 727 F.2d at 978, and failed to determine whether there was "a facially legitimate and bona fide reason for the government's decision to deny parole." As explained above, *Jean* is distinguishable because the aliens in that case had already reached our borders. In any event, the court of appeals in this case applied the very standard adopted by the en banc court in *Jean*, concluding that the Attorney General had "exercised her discretion on the legitimate basis of the very different political climates in Haiti * * * and in Cuba." Pet. App. 22a (citing the "facially legitimate and bona fide" standard).

the Fifth Amendment applies to aliens outside the United States. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (discussing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)).[7] Even if the Fifth Amendment applied to migrants located outside the United States, moreover, providing safe haven to such migrants creates no protected property or liberty interests that could trigger the applicability of the Due Process Clause. Indeed, although the INA confers procedural rights on excludable aliens who have reached a port of entry, it is well established that such individuals have no due process rights in connection with their exclusion proceedings. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950).[8]

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[7] Because this case involves aliens located outside the United States, petitioners err in contending (Pet. 21) that the court of appeals' decision conflicts with this Court's equal protection jurisprudence. For similar reasons, petitioners' allusion (Pet. 21 n.17) to *Korematsu* v. *United States*, 323 U.S. 214 (1944), is entirely misplaced. That case involved an American citizen residing within the United States, *id.* at 215, not an alien located outside our borders.

Petitioners also contend (Pet. 17) that the decision of the court of appeals permits officials at Guantanamo to "act essentially above the law in their treatment of the detained Haitian children." That is not the case. The proscriptions in the Uniform Code of Military Justice, 10 U.S.C. 877 *et seq.*, and provisions of the United States criminal laws made applicable by 18 U.S.C. 7 protect against abuse by military and civilian personnel who assist in the care of the migrants at Guantanamo.

[8] In support of their argument that United States law applies to the Haitian migrants, petitioners cite two cases in

In support of their novel due process theory, petitioners rely (Pet. 26) upon a vacated district court ruling from the Eastern District of New York [9] and

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which United States criminal laws were applied to conduct of individuals on Guantanamo. Pet. 25 (citing *United States* v. *Lee*, 906 F.2d 117 (4th Cir. 1990); *United States* v. *Rogers*, 388 F. Supp. 298 (E.D. Va. 1975)). Those cases are inapposite. *Lee* involved the application of provisions of law that are expressly intended to have extraterritorial application. See 906 F.2d at 117 n.1. And *Rogers* was premised on the erroneous view that the lease agreement between the United States and Cuba provides for general application of United States law on Guantanamo. 388 F. Supp. at 301. Moreover, as petitioners note (Pet. 25), *Rogers* apparently involved the application of the Fourth Amendment to a U.S. citizen, not an alien.

Petitioners' reliance (Pet. 25) on *Huerta* v. *United States*, 548 F.2d 343 (Ct. Cl.), cert. denied, 434 U.S. 828 (1977), is also misplaced. The court in *Huerta* rejected on the merits a takings claim presented by a Cuban contractor with respect to governmental conduct at Guantanamo without addressing the threshold question whether the Just Compensation Clause even applied in such circumstances.

[9] *Haitian Ctrs. Council, Inc.* v. *Sale*, 823 F. Supp. 1028 (1993), vacated by Stipulated Order Approving Class Action Settlement Agreement (E.D.N.Y. Feb. 22, 1994). That vacated district court decree has no precedential force and does not warrant prolonged discussion. That decision was premised on the erroneous view that the Due Process Clause applied on Guantanamo, ignoring that Guantanamo is not part of United States territory and that this Court has held that the Due Process Clause does not apply to aliens outside the United States. See pages 12-13, *supra*, 16-17, *infra*. See also *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1513 (11th Cir.) (per curiam) ("In the present case, the interdicted Haitians have no recognized substantive rights under the laws or Constitution of the United States."), cert. denied, 502 U.S. 1122 (1992).

the Second Circuit's decision in *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326, 1343 (1992), vacated as moot *sub nom. Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (*Sale II*). As petitioners acknowledge (Pet. 24), however, the Second Circuit's ruling was vacated by this Court as moot, and it therefore has no precedential effect. See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975). In any event, even the Second Circuit agreed that the Due Process Clause was not triggered by the act of "transport[ing] * * * interdicted [migrants] to Guantánamo Bay." 969 F.2d at 1345. Under the Second Circuit's analysis, it was the act of "screening in" a migrant (*i.e.*, finding a colorable claim of refugee status) that rendered the Due Process Clause potentially applicable. *Ibid.*

Moreover, in finding a due process right for screened-in migrants, the Second Circuit relied on its view that Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6276, 189 U.N.T.S. 176, and Section 243(h) of the INA, 8 U.S.C. 1253(h), applied to alien migrants outside of the United States. See *McNary*, 969 F.2d at 1344-1345, 1346 n.16. In the Second Circuit's view, "screening in" implicated those provisions and created a "reasonable expectation" by the screened-in migrants "in not being wrongly repatriated." *Id.* at 1345. Subsequent to the Second Circuit's decision, however, this Court held in *Sale I*, *supra*, that Section 243(h) and Article 33 do not apply outside the United States. See 113 S. Ct. at 2559-2567.

Even under the Second Circuit's reasoning, however, there would be no due process right here. No refugee determination or screening has taken place

with regard to the migrants in the present case. The fact that petitioners have been permitted to stay in "safe haven" does not create any enforceable rights or effect any legally significant change in status; it merely reflects a discretionary, humanitarian policy being carried out by the United States. See 94-5138 R.E. 257, 293-294. There is no legal entitlement to be brought to "safe haven" in Guantanamo; there is no legal entitlement to remain there; and the allowance of safe haven certainly confers no enforceable right to be brought to and paroled into the United States.

c. The court of appeals correctly held (Pet. App. 16a-17a) that the Naval Base at Guantanamo Bay is located on the sovereign territory of Cuba, not on United States territory. As the court of appeals recognized (*id.* at 2a & n.1), the Naval Base occupies that foreign land pursuant to a lease agreement with Cuba. The lease grants the United States the right to use and occupy Guantanamo and adjacent water areas. In the agreement, however, the parties explicitly recognize "the continuance of the ultimate sovereignty of the Republic of Cuba over those land and water areas." Agreement between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, Art. II (Feb. 23, 1903); 6 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949*, at 1113-1114 (1971). The court of appeals correctly concluded that the authority exercised by the United States at Guantanamo derives from that agreement, not from any claim of sovereignty.

Petitioners contend (Pet. 23-24) that the issue of the status of Guantanamo merits this Court's review

because the ruling of the Second Circuit in *McNary*, 969 F.2d at 1345, conflicts with the decision of the court of appeals in this case. As explained above, however, this Court vacated the Second Circuit's decision, and it therefore has no precedential weight. In any event, the Second Circuit did not squarely hold that aliens interdicted at sea and housed at Guantanamo had Fifth Amendment rights with respect to their efforts to enter this country. Rather, it held, in affirming the district court's entry of a preliminary injunction, that there existed "serious questions" concerning the applicability of the Fifth Amendment to Guantanamo Bay. 969 F.2d at 1344. Moreover, as pointed out above, even that limited ruling was based on the court's erroneous view (since rejected by this Court in *Sale I*) that 8 U.S.C. 1253(h) and Article 33 of the Refugee Convention applied outside the United States, and therefore created protectable interests on the part of aliens who (unlike the migrants here) had been found to have made a colorable showing of refugee status. Accordingly, further review of that issue is not warranted.[10]

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[10] Petitioners further contend (Pet. 24) that the court of appeals' decision "runs counter to" the *Insular Cases* and, in particular, a statement made by the Court in *Dorr* v. *United States*, 195 U.S. 138, 142 (1904). But the *Insular Cases* generally, and *Dorr* in particular, involved territory over which the United States was exercising "sovereign power." *United States* v. *Verdugo-Urquidez*, 494 U.S. at 268. The Court held in the *Insular Cases* that a variety of constitutional provisions do not apply even in those areas. See *ibid.* Guantanamo, however, is an area over which the United States does not exercise sovereign authority.

Petitioners' reliance (Pet. 24-25) on *Jimenez* v. *The Tuna Vessel "Granada"*, 652 F.2d 415 (5th Cir. 1981), and *Ralpho* v. *Bell*, 569 F.2d 607, 618-619 (D.C. Cir. 1977), is also mis-

2. Petitioners argue (Pet. 18) that the government impermissibly prevented HRC and the Cuban American Bar Association from exercising their asserted First Amendment rights to associate with Haitian and Cuban migrants, while other groups such as Amnesty International were permitted "wide access" to the Naval Base at Guantanamo. The court of appeals properly declined to recognize a First Amendment right of access to aliens at a military base outside the United States. Even in the domestic context, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that

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placed. *Jimenez* involved conduct of the federal district court in the former Panama Canal Zone, an area where, as a matter of Executive discretion, the United States applied numerous treaties and provisions of domestic law. (The Panama Canal Zone no longer exists. The Panama Canal Treaty of 1977, 33 U.S.T. 39, recognized the Republic of Panama's sovereignty over, and the application of Panamanian law in, the area that was formerly the Canal Zone. See Pet. App. 17a n.11.) *Ralpho* involved a challenge to action of the Micronesian Claims Commission, a federal agency covered by the Administrative Procedure Act. 569 F.2d at 616 & n.54. The case concerned a claim submitted by a citizen of Micronesia, a Trust Territory over which the United States admittedly does not exercise sovereignty. *Id.* at 619 n.71. As the court in *Ralpho* noted, however, the federal government had informed the United Nations that the United States "feels that it has a duty toward the peoples of the Trust Territory to govern them with no less consideration than it would govern any part of its sovereign territory." *Id.* at 619 n.72. The United States government has not taken any such position with respect to the migrants temporarily housed at Guantanamo.

might be caused by the speaker's activities." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Assuming, *arguendo*, that under some circumstances access to U.S. military bases abroad might be subject to some form of First Amendment analysis, the Naval Base at Guantanamo is most assuredly not a public forum. See *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976). Apart from the rare instance where a portion of a military base is freely open to civilian traffic (see *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam)), the courts have uniformly recognized military bases to be nonpublic fora, even where they have been opened to the public for special purposes. See *United States* v. *Albertini*, 472 U.S. 675 (1985); *Brown* v. *Palmer*, 944 F.2d 732, 735-739 (10th Cir. 1991) (en banc).[11]

The government's willingness to allow limited access to the Naval Base at Guantanamo does not create a public forum. As this Court has previously recognized, the mere fact that a forum is used for some communication of ideas or information does not dedicate it as a public forum. See *Greer*, 424 U.S. at 831, 836; *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44-47 (1983); *United States* v. *Kokinda*, 497 U.S. 720, 730 (1990) (opinion of O'Connor, J.). Indeed, a contrary rule would provide the government with a significant disincentive for allowing *any* speech or expressive activity on government property. See *id.* at 733.

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[11] Guantanamo is unquestionably a facility to which access is carefully controlled. Both the Executive Order that established the Naval Base, and the regulations that govern its use, place stringent restrictions on civilian entry. See Exec. Order No. 8749, 3 C.F.R. 209 (1941 Supp.); 32 C.F.R. Pt. 761.

Even in the domestic context, the government may restrict speech in a nonpublic forum based upon "subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806; see also *Perry*, 460 U.S. at 46. The government has plainly satisfied that standard in this case.[12] The controlled one-on-one access to the migrants granted to Amnesty International does not support petitioners' claim of viewpoint discrimination. Amnesty International was allowed such access for the purpose of facilitating the federal government's viewpoint-neutral goal of demonstrating to the public that its operations on Guantanamo satisfy the standards of an independent, well-respected human rights organization. See Dep. of Stewart Moneymaker 23 (Nov. 22, 1994); see generally *id.* at 19-31. Similarly, a few other organizations (*e.g.*, the World Relief Organization) have been permitted to maintain a long-term presence on Guantanamo because of their ability to assist the government in caring for the migrants, as demonstrated by their experience and expertise in performing similar tasks worldwide. See R.E. 127; Dep. of Ronald W. Zaperach 53-58 (Nov. 22, 1994); Moneymaker Dep. 23-25. The government's decision to accept their assistance does not constitute impermissible viewpoint-based discrimination. See *Jones* v. *North Carolina*

[12] Petitioners erroneously contend (Pet. 19) that the government imposed a "total ban" on speech by HRC. In fact, HRC attorneys have visited Guantanamo on three separate occasions (during the periods of December 5-9, 1994, January 17-20, 1995, and February 28-March 3, 1995), and they may continue to visit the base under the reasonable access policy adopted by the government. See Pet. App. 71a-72a.

Prisoners' Labor Union, Inc., 433 U.S. 119, 134-135 (1977); *Thornburgh* v. *Abbott*, 490 U.S. 401, 415-416 & n.13 (1989).

3. Finally, further review of petitioners' claim of a constitutional right of access to a list of the Haitian migrants is not warranted. It is well established that the Constitution does not afford a right of access to information in the possession of the government. See, *e.g.*, *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 14-15 (1978) (opinion of Burger, C.J.); *id.* at 16 (Stewart, J., concurring in the judgment); *Senate of California* v. *Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992); *Calder* v. *IRS*, 890 F.2d 781, 784 (5th Cir. 1989); *Capital Cities Media, Inc.* v. *Chester*, 797 F.2d 1164, 1167-1168 (3d Cir. 1986) (en banc); *Gregg* v. *Barrett*, 771 F.2d 539, 546 (D.C. Cir. 1985). Petitioners contend (Pet. 28-29) that HRC has a constitutional right to obtain a list of the Haitian migrants because "[w]here there is a willing speaker, there is a right to hear that speaker." What HRC asserts here, however, is not the right to hear a "willing speaker," but a right to obtain access to government information. Thus, the cases that they cite—*Kleindienst* v. *Mandel*, 408 U.S. 753 (1972) (rejecting challenge to Attorney General's refusal to grant nonimmigrant visa to an alien invited to participate in academic conferences and discussions in the United States), and *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (challenge to state prohibition on advertising of consumer drug prices)—are inapposite.[13]

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[13] Petitioners also erroneously state (Pet. 29) that the government is "isolating" those Haitian migrants at Guantanamo who have not yet expressed a desire to communicate with HRC or other members of the public and is thereby

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General *

FRANK W. HUNGER
Assistant Attorney General

MICHAEL JAY SINGER
MICHAEL S. RAAB
Attorneys

MAY 1995

"blocking the free flow of information." But the Haitian migrants have access to mail and AT&T telephone service, see Moneymaker Dep. 162-163, and they therefore have an opportunity to communicate with HRC or others outside Guantanamo if they so desire.

* The Solicitor General is disqualified in this case.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5138, 94-5231, 94-5234 & 95-4043

CUBAN AMERICAN BAR ASSOCIATION, INC., CUBAN LEGAL ALLIANCE, INC., DUE PROCESS, INC., LIZBET MARTINEZ, ARIANNA GONZALEZ NOBAEZ, ARNIEL DEL CAMPO GONZALEZ, on behalf of Themselves and all others similarly situated, JOVANI MIGUEL FIFFE PINO, NESTOR RODRIGUEZ LABORI, NELSON TORRES PULIDO, MARITZA EXPOSITO, DAVID BUZZI, ALBERTO RODRIGUEZ GARCIA, on behalf of themselves and all others similarly situated, LEYDIS MILAGROS RUIZ MENDEZ, on behalf of herself and all others similarly situated, ELENA PINO, VIRGINIA PEREZ, on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLEES

HAITIAN REFUGEE CENTER, INC., GARRY JOSEPH, PAULOMME EDMOND, PIERRE ONEL ANTOINE, VOIDIEU JEAN LOUIS, BERGELINE JEAN LOUIS, PADECI JEAN LOUIS, PROVISIONAL INTERVENORS

versus

WARREN CHRISTOPHER, Secretary of State, WILLIAM J. PERRY, Secretary of Defense, DORIS MEISSNER, Commissioner, Immigration and Naturalization Service, JANET RENO, Attorney General, IMMIGRATION AND NATURALIZATION SERVICE, BRIGADIER GENERAL MICHAEL WILLIAMS, Commander Joint Task Force, DEFENDANTS-APPELLANTS

On Appeal from the United States District Court
for the Southern District of Florida

[Filed Apr. 18, 1995]

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
United States Circuit Judge

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Supreme Court, U.S.
FILED
MAY 31 1995
CLERK

(3)

No. 94-1611

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

Haitian Refugee Center, Inc., et al.

Petitioners,

VS.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS, CUBAN AMERICAN BAR ASSOCIATION, INC., et al.

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27pp

QUESTIONS PRESENTED

Whether U.S. government officials may deny the Cuban American Bar Association, Inc. and other American pro bono counsel, based upon the content of their speech, access to the Cuban refugees being detained at the United States Naval Base in Guantánamo Bay, Cuba, because, in the lower court's view, the detainees have no rights and therefore no need for counsel.

Whether numerous illegal acts by the Immigration and Naturalization Service and the Attorney General against Cuban refugees detained on Guantánamo are wholly beyond constitutional scrutiny when the detainees are located at a U.S. naval base that is, by perpetual lease, subject to the exclusive jurisdiction and control of the United States.

PARTIES TO THE PROCEEDINGS

The Petitioners are provisional intervenors in the case below, the Haitian Refugee Center, Inc. ("HRC"), and Gary Joseph, Paulomme Edmond, Pierre Onel Antoine, Voidieu Jean Louis, Bergeline Jean Louis, and Padeci Jean Louis, each of them on behalf of themselves and all others similarly situated.

The named Respondents are the defendants in the case below, Warren Christopher, Secretary of State; William J. Perry, Secretary of Defense; Janet Reno, Attorney General; Brigadier General Michael Williams, Commander, Joint Task Force at United States Naval Base, Guantánamo Bay, Cuba; Doris Meissner, Commissioner, Immigration and Naturalization Service; and the Immigration and Naturalization Service.

Sul mitting this response are the plaintiffs in the case below, Cuban American Bar Association, Inc. ("CABA"); Cuban Legal Alliance, Inc.; Due Process, Inc.; Lizbet Martinez; Arianna Gonzalez Nobaez; Arniel del Campo Gonzalez; Jovani Miguel Fiffe Pino; Nestor Rodriguez Labori; Nelson Torres Pulido; Maritza Exposito; David Buzzi; Alberto Rodriguez Garcia; Leydis Milagros Ruiz Mendez; Elena Pino; and Virginia Perez; on behalf of themselves and all others similarly situated (hereafter the "CABA Respondents").

OPINIONS BELOW

The decision giving rise to the Petition, dated January 18, 1995, is reported as *Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995). The panel did not, however, issue the mandate forthwith, because the Cuban and Cuban-American plaintiffs (the CABA Respondents) timely filed a suggestion for rehearing *en banc*, which the panel denied on April 18, 1995. On April 27, 1995, the panel issued its judgment as mandate for Case Nos. 94-5138, 94-5231 and 94-5234, vacating the district court's orders and remanding the cases with directions to dismiss the plaintiffs' claims. Petitioner in this case, the provisional Haitian intervenors, did not seek rehearing before the panel, and thus filed the instant Petition on March 31, 1995. On May 4, 1995, this Court extended until May 31, 1995, the time for all Respondents to respond to the Haitian intervenors' Petition.

The district court's temporary restraining order ("TRO") of October 31, 1994, in favor of the CABA Respondents was limited to only two of the eleven claims for relief in CABA's complaint: the issues of access to counsel and involuntary repatriation. The TRO allowed CABA and other American attorneys reasonable and meaningful access to their clients on Guantánamo and prevented the coerced repatriation of Cuban refugees held there. CABA App. at 1a.[1] On November 7, 1994, the panel unanimously denied the Government's motion for summary reversal of the TRO and partially granted the Government's motion for stay pending appeal. The panel ordered the Government to provide reasonable and meaningful access to counsel for the named plaintiffs and other detainees who requested counsel by written declaration, and enjoined all repatriations except those of detainees who expressed in writing a desire to be returned to "sovereign Cuba." App. at 29a.

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[1] "CABA App." references are to CABA's Appendix attached hereto.

With these modifications, the CABA Respondents are satisfied with and hereby adopt the "Opinions Below" section of the Haitian intervenors' Petition.

STATEMENT OF FACTS AND OF THE CASE

Except as set forth below, the CABA Respondents accept the statement of the case set forth in the Haitian intervenors' Petition, with the caveat that the CABA Respondents lack personal knowledge as to the facts relating solely to the Haitian refugees. While the CABA Respondents fully support the equal treatment of, and humanitarian parole for, the remaining Haitian minors on Guantánamo, they disagree with any statements in the Petition that might be interpreted as calling into question the repressive and totalitarian regime of Fidel Castro, from whom approximately 32,000 Cubans fled in the summer of 1994. See Petition at 9.

In this litigation, the U.S. Government conceded below in the Declaration of former Ambassador Michael Skol, Principal Deputy Assistant Secretary of State for Inter-American Affairs, that any repatriation of Cuban refugees to the Castro regime was and is unacceptable because, among other reasons, Cuba is a "totalitarian state controlled by President Fidel Castro," has a government that "sharply restricts basic political and civil rights," and is a place where "[h]uman rights activists and dissidents are often imprisoned." CABA App. at 13a. The CABA Respondents will set forth additional facts relevant to the Cuban refugees in their own petition for writ of certiorari, which is not due until July 17, 1995.

Furthermore, certain important events have occurred since the filing of the Haitian intervenors' Petition. First, on May 2, 1995, the U.S. Government announced a sharp change in policy concerning the Cuban refugees at Guantánamo. CABA App. at 15a. Under the new policy, the United States will grant humanitarian parole to all nonexcludable Cuban refugees detained at Guantánamo, including all named Cuban plaintiffs

here. Second, on May 19, 1995, the U.S. Government further announced that it would grant humanitarian parole to Haitian minors being held at Guantánamo on a case-by-case basis, as warranted by the best interests of the particular child, and that in any event, all unaccompanied Haitian minors would leave Guantánamo by June 30, 1995. CABA App. at 19a.

ARGUMENT

This Court should defer any ruling on the instant Petition until the CABA Respondents submit their own petition, or, in the alternative, grant the Petition for argument in tandem with the CABA case.

The CABA Respondents fully support the grant of certiorari with respect to the questions presented here. As Haitian intervenors explain in their Petition, the Eleventh Circuit's erroneous decision conflicts with decisions of this Court and other circuits, and raises legal questions of national importance meriting this Court's plenary review. The CABA Respondents plan to file expeditiously their own petition for writ of certiorari to review the panel's final judgment issued April 27, 1995. Among other things, the CABA Petition will address whether the Government's new policies towards Cuban refugees and Haitian minors render moot the claims raised by CABA and the Haitian parties.

The HRC Petition and the CABA Petition will present several common questions. Like the Haitian intervenors, the CABA Respondents will brief the issue whether the Government may engage in content-based discrimination against the speech of American lawyers who seek to counsel refugees indefinitely detained at Guantánamo. The CABA Respondents will also examine whether the Government may deny innocent refugees their constitutional and other rights under U.S. law by detaining them arbitrarily on Guantánamo, territory that is perpetually subject to the complete and exclusive jurisdiction and control of the United States. Due to

this commonality of issues, and the very real possibility that policy changes will render the entire case moot, the CABA Respondents respectfully request that this Court defer any ruling on the instant Petition until it considers the forthcoming CABA Petition. Given that the CABA Respondents were plaintiffs in the case-in-chief, this Court should not, in any event, deny review of this petition until the CABA Respondents have had an opportunity to present their own petition stating why certiorari is warranted. Should the Court choose to grant review of the HRC Petition at this time, the CABA Respondents respectfully request that CABA's forthcoming petition also be granted, and the two cases set for argument in tandem. Should that circumstance arise, the CABA Respondents would support this Court's plenary review of both the issues common to the two petitions and those issues that are unique to the HRC Petition.

Respectfully Submitted,

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Appendix A

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION, et al.

Plaintiffs,

v.

WARREN CHRISTOPHER, et al.,

Defendants,

Case No. 94-2183-CIV-ATKINS

ORDER GRANTING PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE comes before the court on Plaintiffs' Emergency Motion for Temporary Restraining Order filed on October 24, 1994. In their Motion, plaintiffs ask this Court to enjoin temporarily the government from denying plaintiff "Cuban Refugee Service Organizations [(CRSOs)] and other lawyers" access to and communication with their clients; to order the government to provide the CRSOs reasonable access; and to enjoin involuntary repatriation of the detained plaintiff refugees to Cuba.

The court held a hearing on plaintiffs' motion on Wednesday, October 26, 1994. Both parties were represented at the hearing and presented arguments. At the close of the hearing, the court advised the parties that it would take the

matter under consideration. A review of the record suggests that a temporary restraining order is warranted in this case.

FACTUAL BACKGROUND

The genesis of this case goes as far back as 1960 and Fidel Castro's institution of a Communist regime in Cuba. Since that time, the United States has had a favorable policy towards Cubans fleeing Castro's totalitarian regime. This policy granted the Cubans refuge and asylum in the United States, eventually leading to permanent residence and citizenship.[1] At that time, and up to the recent past, the Cuban government prohibited Cubans from leaving for the United States. However, in August of 1994, the Cuban government rescinded this policy and began allowing Cubans to leave for the United States by the thousands. As a result, on August 19, 1994, President Clinton announced at a press conference that no more Cubans would be allowed into the United States and that any Cubans found at sea would be detained in Guantanamo Bay.

On September 9, 1994, as a result of negotiations between the governments of the United States and the Republic of Cuba, the two governments signed a Joint Communiqué designed to ensure that migration procedures were safe and legal. The agreement will allow 20,000 Cubans entry into the United States each year. Those given permission to enter will consist of persons who qualify as refugees and their families, persons issued visas and their families and persons who are selected based on a "lottery" system. However, in order to receive any benefit from this agreement, the Cubans must return to Cuba and invoke the procedures established by recent negotiations between the United States and Cuba. Until they voluntarily decide to return, they will be held in safe havens like

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[1] *See* Cuban Democracy Act, 22 U.S.C. § 6001 *et seq.*; Refugee Act of 1980, 8 U.S.C. § 1521 and Cuban Adjustment Act, 8 U.S.C. § 1255.

Guantanamo Bay. At present, the government has repatriated 42 refugees and is ready to repatriate as many as 1,014 more.

On October 11, 1994, the CRSOs and other attorneys asked the United States government for access to refugees at Guantanamo. At an October 20, 1994 meeting between the CRSOs and government representatives, the CRSOs were informed that some access would be allowed, but no specifics were given. On October 23, 1994, the CRSOs and certain detained refugees filed suit against the government alleging that the government was denying the attorneys and the detained refugees certain statutory, Constitutional and international law rights.[2] On October 24, 1994, the government sent a letter to plaintiff attorneys granting up to six attorneys access to refugees at Guantanamo for two days. Meanwhile, the plaintiffs ask this Court to enjoin the government from denying the CRSOs unlimited access to their clients and from repatriating any more refugees before the attorneys have an opportunity to consult with them and ensure that their decision to return to Cuba is voluntary. Counsel do not dispute that refugees may repatriate of their own free will at any time. The issue is whether the detained plaintiff refugees taken by the government to Guantanamo Bay, over which area the government has complete control and jurisdiction, are entitled to advice of counsel to assure their 'voluntary' decision to repatriate.

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[2] The plaintiffs base their claims on certain sections of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*; the Cuban Adjustment Act of 1966, 8 U.S.C. § 1255; the Refugee Act of 1980, 8 U.S.C. § 1521; the Administrative Procedure Act 5 U.S.C. § 551 *et seq.*; the First and Fifth Amendments of the United States Constitution, and various principles of international law.

This Court has jurisdiction based on 28 U.S.C. § 1331; 8 U.S.C. § 1329; 5 U.S.C. § 702 and 28 U.S.C. §§ 2201, 2202.

DISCUSSION

This court may enter preliminary injunction relief, such as a temporary restraining order, only if the movant shows all of the following: (1) a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable injury if the relief is not granted; (3) that this irreparable harm outweighs the harm the relief might cause the non-movant; and (4) that the relief would not be adverse to the public interest. *Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff'd*, 111 S. Ct. 888 (1991).

(1) Likelihood of Prevailing on the Merits

As previously mentioned, the plaintiffs' claims are based on various statutory, Constitutional and international law principles. The plaintiffs' main contention, for purposes of this Motion,[3] is that the government is denying the attorneys their First amendment rights and the detained plaintiff refugees substantive and due process rights by denying them access to their attorneys. Consequently, the plaintiffs argue that the "voluntary" repatriation of the refugees cannot in fact be voluntary absent the advice of counsel and informed consent. In support of their position, the plaintiffs ask this Court to consider *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (hereinafter *Sale*).

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[3] The court emphasizes that it does not state any opinion regarding policies towards Cuba or conditions at Guantanamo. The scope of this Order is limited to the issues of right to access and voluntary repatriation. As plaintiffs argue, there are two key elements to voluntariness: full information so as to have informed consent and a non-coercive environment, such as adequate living conditions. At this stage, the court is only considering the issue of right to access and whether the Cuban refugees are being denied the opportunity to be fully informed, thus, preventing voluntary repatriation. The issue of adequate living conditions will be examined at a later stage, if necessary.

In response to these claims, the government argues that the detained plaintiff refugees have no substantive legal rights and, thus, the attorneys have no First Amendment right to access to them. Furthermore, even assuming the existence of a First Amendment right, that right does not mandate that the government assist the attorneys in advising their putative clients. Additionally, the government argues that the refugee's repatriation decisions are made voluntarily after full disclosure of their options. To support its arguments, the government relies on *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993) (hereinafter *HCC*) and *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied* 112 S. Ct. 1245 (1992) (hereinafter *Baker*).

The court's review of these arguments in light of the relevant law suggests a substantial likelihood that plaintiffs ultimately will prevail. First, the rules set forth in *Sale* support the plaintiffs' position. The Haitian plaintiffs in the *Sale* case asserted causes of action very similar to those asserted by the detained plaintiff refugees.[4] Additionally, *Sale* and the present case have several controlling factual similarities: 1) both the Haitians and the Cubans are being detained in Guantanamo; 2) the attorneys for both requested permission to communicate with their clients; 3) in both situations, other groups were

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[4] Specifically, they alleged

> 1) denial of the Haitian Service Organizations' First Amendment rights to provide advocacy and counselling to their clients detained in Guantanamo; 2) denial of the Haitian detainees' First and Fifth Amendment constitutional rights to obtain and communicate with counsel; 3) denial of the Haitian detainees' constitutional due process right to adequate medical care, to be free of indefinite detention and arbitrary punishment; 4) failure of the Government to follow rulemaking procedures; 5) arbitrary and capricious agency action not in accordance with the law; 6) judicial enforceability of the duty of non-refoulement; and 7) equal protection.

Sale, 823 F. Supp. at 1034.

allowed contact and communications with the detainees, indicating possible viewpoint discrimination, and 4) the attorneys in both cases sought and seek to communicate with their clients at their own expense, not the government's. Based on this similar set of facts, the *Sale* court found that:

1. The United States has complete jurisdiction and control over Guantanamo Bay and, thus, the First Amendment applies there. *Id.* at 1036, 1040.

2. The government's decision to deny Haitian Service Organizations (HSO) access to the detainees "is based solely on the content of what they had to say and the viewpoint they would express," *id.* at 1036, in violation of the First Amendment. *Id.* at 1041. Furthermore, the HSOs' First Amendment right does not depend on whether the detainees have a right to counsel. *Id.*

3. That the Haitians have due process rights because they "are at a military base solely because the defendants chose to take them there . . . . If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin." *Id.* at 1042.

4. That the detainees had a right to review under the Administrative Procedure Act. *Id.* at 1045-49.

Therefore, it appears to this Court that the *Sale* decision suggests a substantial likelihood that plaintiffs ultimately will prevail. Notably, no appeal was taken from that ruling.[5]

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[5] Two of the defendants in *Sale* were Warren Christopher, Secretary of State, and Janet Reno, Attorney General, who are also defendants in this action *sub judice*.

Second, the cases that the government relies on for support contain significant factual distinctions. The government relies on *HCC* for the assertion that "the Supreme Court has held that section 243(h) of the [Immigration and Naturalization Act], which the plaintiffs claim prohibits the Attorney General from repatriating Cubans from Guantanamo, does not apply to extraterritorial actions or procedures." Defendant's Opposition to Plaintiffs' Request for Injunctive Relief at 2.[6] A careful reading of *HCC* shows that this case dealt with Haitians being interdicted by the Coast Guard on the highs seas and returned to Haiti pursuant to an Executive Order. The Court reviewed the history of both § 234(h) and Article 33 of the United Nations Convention Relating to the Status of Refugees[7] and determined that they only apply to aliens who have already been admitted to the United States or are already *within United States territory but not yet admitted.* Accordingly, the Court concluded that neither provision placed any limitations on the

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[6] Section 243(h) provides in pertinent part:

> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> . . .

Immigration and Naturalization Act § 234(h), as amended, 8 U.S.C. § 1253(h).

[7] Article 33.1 states:

> 1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> . . .

Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577.

President's authority to repatriate aliens *intercepted on the high seas*. *HCC* has no bearing on the present case, where the refugees are not on the high seas but rather within United States territory at Guantanamo Bay.

The government also relies on *Baker*. There, the Eleventh Circuit determined that Haitian refugees on Coast Guard cutters had no substantive legal rights. Consequently, the attorneys for the Haitians had no First Amendment right to access and advise their clients because that right was "predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant." *Baker*, 953 F.2d at 1513. The court further concluded that even assuming the attorneys have some right of access, the Constitution does not require the government to assist the attorneys in obtaining that access. While these rulings facially appear to be binding on the present case, the factual distinctions between *Baker* and the present case indicate that the opposite is true.

The first significant distinction is that *Baker* focuses on the Haitian refugees located on Coast Guard cutters outside United States territory.[8] Conversely, the detained plaintiff refugees are located at Guantanamo, a United States territory. The fact that the Haitian refugees where [sic] on the high seas led to the *Baker* court's ultimate determination that they had no substantive rights and, thus, the attorneys had nothing on which to base their First Amendment right to associate with and advise the Haitians. That is not the case here. As the *Sale* decision indicates, once the Cuban refugees where detained in Guantanamo, they became entitled to certain due process and substantive rights, which serve as a predicate to the CRSOs' First Amendment claim in this case.

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[8] *See Baker*, 953 F.2d 1512, 1515 (Hatchett, J., dissenting) ("For the majority, that is the heart of the matter; the refugees are outside of the United States.")

Another distinction is the fact that the plaintiffs in *Baker* did not allege any viewpoint discrimination.[9] The opposite is true here. The detained plaintiff refugees, like in *Sale*, are alleging that while they are being denied access to and communication with the refugees, other groups are not, resulting in viewpoint discrimination by the government.

A third vital distinction is that the *Baker* plaintiffs were asking the government for assistance in obtaining access to the refugees at extreme cost to the United States. The court presumed that this meant finding and funding transportation to the cutters or bringing the Haitians ashore, concluding that such assistance "would impose a substantial burden on the United States." *Id.* at 1514. No such burden exists here. The CRSOs have repeatedly indicated that they are ready to provide transportation and shelter at their own expense. All they ask of the government is to provide access and a forum. In light of the fact that the government has given permission for six attorneys to travel to Guantanamo for two days, there does not appear to be any substantial burden on the government.

Having determined, for purposes of the present inquiry, that the *Sale* case is most factually related to the present case and that the cases the government relies on are inapplicable because of material distinctions, the court finds that the facts demonstrate a substantial likelihood that plaintiffs will prevail on the merits. Accordingly, plaintiffs have satisfied the first requirement for preliminary injunctive relief.

Irreparable Harm

Plaintiffs have demonstrated irreparable injury in the absence of a temporary restraining order in the form of declarations indicating that many detained plaintiff refugees

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[9] "The district court noted that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination." *Baker*, 953 F.2d at 1512 n.7.

may suffer persecution and other negative consequences if repatriated to Cuba. Additionally, irreparable injury will result if these detained plaintiff refugees are repatriated without being afforded their substantive and due process rights. The government has already repatriated forty-two (42) Cuban-refugees. Another one thousand fourteen (1,014) are ready to be processed for repatriation. There is no question in the court's mind that the harm that would result from repatriating these refugees to a country from which they risked their lives to flee, without providing them their rights and determining if their decisions are truly voluntary, is unquestionably irreparable.

Balance of Hardships

In considering the balance of hardships, courts take into account the burdensomeness of a temporary restraining order on the defendants. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948 at 447 (1973). The court's review of the record suggests that any burden to the government in this case is minimal. The CRSOs have indicated that they are not asking the government to subsidize access to the detained refugee plaintiffs. The only 'burden' on the government is to provide access and the proper forum. In light of the fact that the government has already agreed to limited access, the court finds that this burden is substantially outweighed by the above-described irreparable harm to the plaintiffs.

Disservice to Public Interest

Finally, the government has failed to show, and the record does not reveal, any disservice injunctive relief would cause to the public interest. Therefore, the court finds that no disservice to the public interest would result from the present temporary restraining order.

CONCLUSION

Having considered the filings and oral argument of counsel, it is

ORDERED AND ADJUDGED that:

1. Plaintiffs' October 24, 1994 Emergency Motion for Temporary Restraining Order is **GRANTED** as follows:

(a) Defendants shall refrain from denying Cuban Refugee Service Organizations and other counsel reasonable and meaningful access to the detained refugee plaintiffs; and

(b) Defendants shall refrain from repatriating any detained plaintiff refugees, including those twenty-three (23) persons who were the subject of the temporary restraining Order entered October 25,1994, without permitting them access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation.

2. Plaintiffs shall deposit, no later than 5:00 p.m. on November 1, 1994, the sum of $500.00 into the court registry to serve as security during the pendency of this Order.

3. Counsel are to submit within five (5) days a proposed agreed plan for the visitation of a requisite number of lawyers for the necessary time to conduct the proposed interviews of the subject refugees. If counsel cannot agree on appropriate details of the arrangements, the court will, on application, consider appointing a Special Master to supervise the proceedings.

4. Counsel are to submit a joint report every 30 days as to the progress in accomplishing the above objectives.

5. This Order will remain in effect until further order of the court. In light of the twenty-four (24) declarations submitted by the parties, the court assumes no further factual development is to be made and the court may proceed to enter a Preliminary Injunction, preserving all objection heretofore

made. However, if counsel desire a further hearing to submit additional, non-duplicative evidence, in support of their respective positions, they are to advise the court in writing within five (5) days of the file date of this Order.

DONE AND ORDERED at Miami, Florida, this ____ day of _____, 1995 at _____.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record.

Appendix B

Excerpts from Declaration of Michael Skol
Principal Deputy Assistant Secretary of State
for Inter-American Affairs, Department of State
November 23, 1994

11. The situation in Cuba presents a stark contrast to that in Haiti. Cuba remains a totalitarian state controlled by President Fidel Castro, who is Chief of State, Head of Government, First Secretary of the Communist Party, and Commander-in-Chief of the Armed Forces. President Castro exercises control over all aspects of Cuban life through a broad network of directorates ultimately answerable to him through the Communist Party, as well as through the bureaucracy and the state security apparatus.

12. The Government of Cuba sharply restricts basic political and civil rights, including freedom of expression, association, assembly and movement, as well as the right to privacy. The Ministry of the Interior is the principal organ of state security and totalitarian control and is under the *de facto* control of the Revolutionary Armed Forces, which are in turn directed by Fidel Castro's brother, Raul. The Ministry of the Interior vigorously investigates "nonconformity" and actively suppresses organized opposition and dissent against government officials. It maintains a pervasive system of vigilance through undercover agents, informers, "rapid action brigades," and "Committees for the Defense of the Revolution," which are used as a means to mobilize citizens against dissenters, to impose ideological conformity, and to root out "counterrevolutionary" behavior. Human rights activists and dissidents are often imprisoned for offenses such as "enemy propaganda," "illicit association," "contempt for authority," "Dangerousness," or the broad charge of "rebellion." Hundreds or perhaps thousands of Cubans are in prison for various

political crimes, and Cuban government authorities use the threat of prosecution to intimidate many others.

13. The Cuban people have no right to choose their leaders. The only legal political organization is the Communist Party, which is headed by Fidel Castro. Castro or subordinate party officials make all important political decisions. In the 1993 elections for the National Assembly, every candidate had to be screened by a "Candidacy Commission" composed of representatives of party-controlled "mass organizations." Only one candidate per seat was allowed. These procedures ensured that only government supporters would be on the ballot. Voters were given only one option, either to vote "Yes" or to leave the ballot blank. Formation of political parties, campaigning, and making campaign promises were forbidden.

Appendix C

Statement of Attorney General Janet Reno
Regarding Cuban Migration
May 2, 1995

I would like to make an announcement regarding Cuban migration.

It has long been the policy of the United States that Cubans who wish to migrate to the United States should do so by legal means. The U.S. Interests Section in Havana accepts and processes requests for visas, and it also operates an in-country program for those Cubans who seek refugee status for entry into the United States.

Pursuant to this policy, last August I announced that Cubans attempting irregular means of migration to the United States on boats and rafts would not be allowed to enter this country, but rather would be brought to the United States Naval base at Guantanamo Bay, where they would be offered safe haven.

Last September, following negotiations with representatives of the Cuban government, the United States announced that it would increase Cuban migration to the United States to permit 20,000 legal entrants per year. This program, which includes immigrant visas, refugee applications, and a Special Cuban Migration Program designed to broaden the pool of potential entrants, is on target, and we expect to continue legal Cuban migration at this level in the years to come. This year alone, we expect to bring 7,000 Cuban refugees to the United States through our in-country program in Havana.

Following recent diplomatic exchanges with the Cuban government, the United States is now prepared to take another important step towards regularizing Cuban migration between Cuba and the United States.

First, with respect to Guantanamo:

- We will continue to bring to the United States those persons who are eligible for special humanitarian parole under the guidelines announced by the President last October and December.
- The government of Cuba has agreed to accept all Cuban nationals in Guantanamo who wish to return home, as well as persons who have previously been deported from the United States and persons who would be ineligible for admission to the United States because of criminal record, medical, physical, or mental condition, or commission of acts of violence while at Guantanamo.
- All other Cubans in the safe haven will be considered for entry into the United States on a case-by-case basis as "Special Guantanamo Entrants," bearing in mind the impact of paroles on state and local economies and the need for adequate sponsorships. As has been true for all Cubans and Haitians previously paroled into the United States from Guantanamo, sponsorship and resettlement assistance will be obtained prior to entry. The number of these "Special Guantanamo Entrants" admitted to the United States will be credited against the 20,000 annual Cuban migration figure, beginning in September of this year, at the rate of 5,000 per year (regardless of when the Special Guantanamo Entrants are admitted).

Second, with regard to future irregular migration:

- Effective immediately, Cuban migrants intercepted at sea attempting to enter the United States, or who enter Guantanamo illegally, will be taken to Cuba, where U.S. consular officers will assist those who wish to apply to come to the United States through already established mechanisms. Cubans must know that the only way to come to the United States is by applying in Cuba.

- All returnees will be permitted to apply for refugee status at the U.S. Interests Section in Havana. Cuba is one of only three countries in the world in which the United States conducts in-country processing for refugees. The Government of Cuba has committed to the Government of the United States that no one will suffer reprisals, lose benefits, or be prejudiced in any manner, either because he or she sought to depart irregularly or because he or she has applied for refugee status at the U.S. Interests Section. The Cuban Government made a similar commitment in the context of the September 1994 agreement, and we are satisfied that it has been honored. Moreover, the Government of Cuba will permit monitoring by U.S. consular officers of the treatment of all returnees.

- Migrants intercepted at sea or in Guantanamo will be advised that they will be taken back to Cuba, where U.S. consular officials will meet them at the dock and assist those who wish to apply for refugee admission to the United States at the Interests Section in Havana. They will be told that the Government of Cuba has provided a commitment to the United States Government that they will suffer no adverse consequences or reprisals of any sort, and that U.S. consular officers will monitor their treatment. They will also be told that those persons who seek resettlement in the United States as refugees must use the in-country refugee program.

- Measures will be taken to ensure that persons who claim a genuine need for protection which they believe cannot be satisfied by applying at the U.S. Interests Section in Havana will be examined before return.

- Cubans who reach the United States through irregular means will be placed in exclusion proceedings, detained, and treated as are all illegal migrants from other countries.

- The United States Government reiterates its opposition to the use of violence in connection with departure from Cuba and its determination to prosecute cases of hijacking and alien smuggling.

* * * * * * * * *

These new procedures represent another important step towards regularizing migration procedures with Cuba, finding a humanitarian solution to the situation at Guantanamo, and preventing another uncontrolled and dangerous outflow from Cuba.

The United States policy towards Cuba remains the same. We remain committed to the Cuban Democracy Act and its central goal — promoting a peaceful transition to democracy in Cuba. We will continue to enforce the economic embargo to pressure the Cuban regime to reform. We will continue to reach out to the Cuban people through private humanitarian assistance and through the free flow of ideas and information to strengthen Cuba's fledgling civil society. And we remain ready to respond in carefully calibrated ways to meaningful steps toward political and economic reform in Cuba.

Appendix D

Excerpts from Letter of Amy Jeffress
Office of the Deputy Attorney General
to Professor Harold H. Koh
May 19, 1995

Thank you for writing to me about the situation of the Haitian unaccompanied minors in Guantanamo. I would have liked to have responded sooner, but the Department has been working with other federal agencies to address this problem, and I wanted to wait until we reached an acceptable resolution before writing.

We have been working with the United Nations High Commissioner for Refugees and other organizations to ensure that each unaccompanied Haitian minor is placed in the best situation for that particular child. In some cases, especially where the child's parents or closest relatives are in Haiti, the child's best interests call for repatriation to Haiti. In other cases, resettlement in the United State to join family members or other appropriate sponsors best meets the child's needs, and we have authorized parole for these minors. The situation of each minor is being reviewed on a case-by-case basis, a complex process that involves tracing and interviewing family members and conducting home visits.

We understand that the time required for this process of case-by-case review and the resulting prolonged stay of the unaccompanied minors in Guantanamo has raised significant humanitarian concerns. Therefore, we have determined, as of today, to ensure that all of the unaccompanied minors leave Guantanamo by June 30. No unaccompanied minors will remain in Guantanamo after that date, and no minor will be returned to Haiti unless there is a determination that repatriation is in the best interests of that child.

(4)

No. 94-1611

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In The

Supreme Court Of The United States

October Term, 1994

Haitian Refugee Center, Inc., et al.,

Petitioners,

vs.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTORY STATEMENT

Petitioners submit this reply brief pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States to address certain arguments raised by Respondents in their brief in opposition to the petition for a writ of certiorari.

FURTHER STATEMENT OF THE FACTS

Nothing in the Government's Opposition Brief changes the fact that the Haitian minors held at the United States Naval Base in Guantanamo Bay, Cuba ("Guantanamo"), have been detained for nearly a year, and continue to be detained, under arduous conditions that the Government has officially admitted to constitute an "extraordinary hardship." Petition Appendix ("Pet'n App.") at 39a. This hardship was the Government's stated basis for its decision months ago to grant, as it did, a group parole to all of the unaccompanied Cuban children at Guantanamo. *Id.* Those same camps, though, that were too harsh for the white Cuban minors were apparently considered acceptable for the black Haitian children.[1] The arguments that the Government later put forth to justify its discriminatory decision to parole the

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[1] Because the Haitian children who are the subject of this petition continue to be held under these conditions of "extraordinary hardship," the urgency of their needs means that Petitioners must oppose the request for delay of these proceedings sought by the Cuban American Bar Association ("CABA"), the plaintiffs below, in the "Respondents" brief that it recently filed with this Court. CABA, representing the interests of Cuban refugees held on Guantanamo, argued therein that the commonality between the issues raised by Petitioners and those that will be raised by CABA made it appropriate for this Court to defer ruling on the instant petition until CABA's is filed. As CABA itself points out, however, there remains very little common interest between Petitioners and CABA, because the Government has already granted a group parole to the unaccompanied Cuban minors, Petition ("Pet'n") at 5, and has now shifted its policy once again and granted a blanket parole to all of the approximately 20,000 Cuban refugees currently on Guantanamo. *See* Brief of Respondents CABA, Appendix ("CABA App.") at 15a. By contrast, the Haitian children have never been granted any such blanket relief. There is therefore no reason to delay these proceedings pending CABA's submission.

Cuban minors but not the Haitian children, based upon the purported political differences between Cuba and Haiti, have merely been a *post hoc* litigation strategy.[2] They were never mentioned at the time of the parole of the Cuban minors.

Now, relying upon factual material that is not in the record, the Government in its Opposition Brief has shifted its litigation position once again, arguing that it has purportedly begun a case-by-case processing program by which it will review the immigration status of each unaccompanied Haitian child, "based on a judgment of what is in the best interest of each child." Opposition Brief ("Opp.") at 3. Even if it is assumed, *arguendo*, that this program is carried out sincerely and effectively, it still falls far short of the group parole that was granted to the Cuban minors, and so it fails to cure the Government's discriminatory treatment of the Haitian children.

Since it is not in the record, the Government's information regarding this putative processing program should properly be stricken from the Opposition Brief, but, if this Court decides that it wishes to take this material into consideration, then it should be made aware of all of the facts surrounding it, and not simply those that the Government chooses to reveal. For instance, the Government's Brief does not reveal that there have been reports in reputable media sources that the Government's purported efforts thus far to place those unaccompanied Haitian children who have been involuntarily repatriated from Guantanamo in stable families has been failing badly, leaving the children to fend for themselves in the slums and on the streets of Haiti. Reply Brief of Petitioners, Appendix ("Reply App.") at 2a.

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[2] Moreover, the Government's recent shift in immigration policy toward Cuba eviscerates the rationale that political differences between Cuba and Haiti justified the harsher treatment of Haitian refugees. As part of this argument, the Government had contended that it could not repatriate Cuban refugees to Cuba, because of the political repression and potential for physical harm faced by refugees returned to Cuba. *See, e.g.*, Opp. at 6. According to the Government's newest policy, however, all new Cuban refugees attempting to reach Guantanamo henceforward will be returned to Cuba, regardless of any potential consequences. *See* CABA App. at 15a. This reversal of policy thus exposes the Government's earlier concern for the political environment in Cuba as a sham.

Other reports have indicated that some Haitian children have been placed with complete strangers in Haiti. Reply App. at 4a. Finally, those sources have disclosed instances where Haitian children were forced back to Haiti despite having identified relatives living in the United States. Reply App. at 1a.

Also, the Government neglects to mention in the context of its processing program that the Haitian children at issue have now been held in detention at Guantanamo for almost a year. Despite having had all of that time to attend to the needs of the Haitian children, the Government admitted that it was only in late May 1995, after Petitioner Haitian Refugee Center ("HRC") had filed its Petition, that it reached what it called "an acceptable resolution" designed to "address this problem." CABA App. at 19a. Following, as it does, this long period of neglect, the fact that the Government has only now roused itself to demonstrate solicitude for "the best interests of each child" calls the genuineness of its concern into question. Certainly, the Government has never shown the same concern for the Haitian children's well-being as it has for that of the Cuban children.

Moreover, the Government's claim that it is "tracing and interviewing family members and conducting home visits," CABA App. at 19a, on behalf of the Haitian children rings especially hollow. The most extensive source of family contacts for the Haitian children, the most effective mediator for interviews and home visits, and the most useful counselor for the Haitian children as they undergo this case-by-case review, is HRC, *see* Pet'n App. at 38a, yet the Government has never once consulted it. Indeed, the Government even continues to refuse to provide HRC with a list of the names of the Haitian children held at Guantanamo, even though such a list would enormously speed the process of tracing family members. Instead, as described in the Petition and *infra*, the Government has systematically refused to allow HRC access to the Haitian children, even though all that HRC has sought to do is to provide just the sort of services to the Haitian children that the Government has now admitted are "in the best interests of each child." CABA App. at 19a. This insincere, ineffective, eleventh-hour "solution" that

the Government has put forth from outside the record in this case is no solution at all. It contemplates forcing the Haitian children out of their harsh detention at Guantanamo into an even more inhumane and dangerous future on the largely lawless streets of Haiti, and it should not be countenanced by this Court.

ARGUMENT

Try as it might, the Government's Brief cannot overcome the fact that the decision of the panel below squarely conflicts with the explicit holding of this Court in *Jean v. Nelson*, 472 U.S. 846 (1984). The Court in *Jean* expressly held that 8 U.S.C. § 1182(d)(5)(A), the same statute that is at issue in the instant case, limited the otherwise broad discretion of the Attorney General's parole powers, by forbidding her from making parole decisions based on the race or national origin of the aliens at issue; specifically, it stated with regard to § 1182(d)(5)(A) that "the current *statutes* and regulations provide petitioners with non-discriminatory parole consideration." *Id.* at 854-55 (emphasis added). This Court then remanded the matter for a determination whether "INS officials exercised this broad discretion under the *statutes* and regulations without regard to race and national origin." *Id.* at 857 (emphasis added). In spite of this binding precedent, the panel below reached the opposite conclusion, holding that "there is little question that the Executive has the power to draw distinctions among aliens based on nationality." Pet'n App. at 22a. To reach this erroneous conclusion that it was permissible for the Government in this case to detain the Haitian children under harsh living conditions at Guantanamo, while at the same time offering parole *en masse* to the similarly-situated Cuban children, the panel below relied upon the lower-court opinion in *Jean*, *id.*, which was rendered bad law after this Court in *Jean* affirmed only the lower court's judgment and disavowed its reasoning. The panel did not acknowledge even in passing the controlling, contrary language in this Court's opinion in *Jean*. *See id.*

In its Brief, the Government does not (because it cannot) resolve the stark conflict between the lower court's holding and

this Court's decision in *Jean*. Instead, the Government offers only the empty contention that this Court, in deciding *Jean*, did not mean what it said. Despite the fact that this Court in *Jean* repeatedly stated that it was interpreting the "statutes and regulations" governing the Attorney General's parole discretion, the Government argues that *Jean* addressed a "regulatory practice" and did not construe the governing statute. Opp. at 10. This argument, however, openly contradicts the language of this Court's opinion in *Jean*, as quoted above, and, indeed, the Government offers no support for it apart from a vague reference to certain items from the legislative history of § 1182(d)(5)(A). *Id.* This legislative history, of course, carries no authority now that the statute has already been expressly construed by this Court. Finally, the Government's own Brief appears to concede that *Jean* extended to the Government's statutory authority, and not just its "regulatory practice." That Brief notes that "[t]he government repeatedly stated [in *Jean*] that both Congress and the Executive could make nationality-based distinctions by *statute* or regulation." Opp. at 11 n.5 (emphasis added). There would be no need for the Government to have made such arguments concerning its statutory authority unless it were the statute at issue before this Court.

Indeed, as it must, the Government does concede that *Jean* construed "the restrictions placed on INS by the 'statute' and regulations." Opp. at 11 n.5. Having acknowledged this point, however, the Government proceeds to ignore it. After digressing irrelevantly on the Government's litigation posture in *Jean*,[3] its Brief then states that "[n]or was this Court's disposition of *Jean* in any way dependent upon a conclusion that the Executive Branch was barred by statute from considering nationality in its

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[3] As noted in the Petition, the Government conceded at oral argument in *Jean* that it was barred from exercising its parole discretion on the basis of race or national origin. Pet'n at 14-15. In its Brief, it attempts to minimize this concession by arguing that it referred only to the applicable regulations and not to the governing statutory authority. Opp. at 11 n.5. However, as described *supra*, this Court's reference in *Jean* to the "statutes and regulations," *Jean*, 472 U.S. at 854-55, 857, make clear that it was understood at that time by all parties that this Court was reviewing the scope of the statute, not just the implementing regulations.

parole decisions." *Id.* In light of the fact that this Court explicitly remanded *Jean* with the instruction that the exercise of statutory discretion on the basis of race or nationality was impermissible, *Jean*, 472 U.S. at 857, the Government's statement is breathtaking in its inaccuracy.

Despite the Government's efforts to render it murky, this Court's holding in *Jean* is unequivocal and inescapably in conflict with the opinion of the panel below. This Court should not permit its binding precedential authority to be disregarded in this manner. It should grant certiorari in this case and reverse the decision of the panel below.

The other arguments raised by Petitioners as grounds for certiorari also remain unrefuted by the Government. Indeed, with regard to the Petitioners' claim of impermissible viewpoint discrimination in violation of the First Amendment, the Government's Opposition Brief all but concedes that such discrimination has been and is continuing to be practiced. The Government admits that it has afforded broad access to the Haitian refugees to those groups that "assist the government." Opp. at 20. In other words, the only groups that can have "one-on-one access" to the Haitian children and can "maintain a long-term presence on Guantanamo," *id.*, are those that disseminate a message that the Government has deemed acceptable.

Petitioner HRC, however, whose message is not approved by the Government, is barred from meaningful access.[4] The extensive network of support services that HRC can provide to the Haitian children detained at Guantanamo is precisely the sort of assistance that the Government purports to be seeking as it supposedly conducts case-by-case reviews of each Haitian child's situation, but nonetheless it refuses HRC any meaningful contact through which those services can be put to use. These restrictions drawn by the Government are not viewpoint neutral.

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[4] The Government's claim that it has provided "reasonable access" to HRC, Opp. at 20 n.12, distorts the facts of this case. The Government has only allowed HRC access to the Haitian refugees for short periods of time, and all interviews conducted by HRC were subject to heavy Government surveillance. Pet'n at 7-8.

For this reason, the panel's decision to allow the Government to flout the First Amendment is deserving of review.

Moreover, the Government continues to refuse even HRC's simple request for a list of the names of the Haitian children in detention. With such a list, HRC could conduct its own search for family members and could speed the process that the Government now purports to be carrying out on behalf of the Haitian children. As set forth in the Petition, this denial of the list of names violates the First Amendment. Pet'n at 28-29. As shown by the outside-the-record information in the Briefs of the Government and CABA, it also contradicts the Government's untenable claim to be acting the Haitian children's best interests.

Finally, the Government's Opposition Brief fails to refute the flaws in the panel's decision to deny the fundamental protections of the Due Process and Equal Protection Clauses to the Haitian children held under United States jurisdiction and control at Guantanamo. The distinctions that the Government attempted to make among the cases cited by Petitioner to support the applicability of fundamental constitutional protections for the Haitian children are ineffective.[5] Case law has consistently

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[5] For instance, the Government misstates the holding of *Jimenez v. The Tuna Vessel "Granada,"* 652 F.2d 415 (5th Cir. 1981), wherein the protections of the Constitution were recognized to encompass the Panama Canal Zone, where the United States exercised exclusive jurisdiction and control but not sovereignty. The Government claimed that that case involved only "treaties and provisions of domestic law." Opp. at 18 n.10. This interpretation is simply wrong: the court in *Jimenez* reversed the district court on constitutional grounds, finding that the "notice demands of procedural due process" were not met. *Jimenez*, 652 F.2d at 422. The Government further claims that the applicability of United States law in the Panama Canal Zone was "a matter of Executive discretion." Opp. at 18 n.10. This presumptuous statement conceives of the Executive as the final arbiter of the scope of the Constitution, instead of this Court, and it is unsurprising that the Government can offer no support for this proposition.

Similarly, the Government also seeks to escape the holding of *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). That case recognized that constitutional protections applied to the people of Micronesia, another area where, like in Guantanamo, the United States exercised exclusive jurisdiction and control but not sovereignty. *Id.* at 618-19. In its Opposition Brief, the Government argues that the *Ralpho* court extended constitutional protections to Microne-

recognized that the fundamental protections of the Constitution extend to areas where the United States exercises, as it does at Guantanamo, exclusive jurisdiction and control. Pet'n at 24-25. Those protections are particularly applicable to the Haitian children in this case, because, despite the Government's claim that there has been no "screening-in" done in this case, Opp. at 15-16, all of the Haitian refugees were screened when they were first detained by the Coast Guard, and only those who were approved were granted Safe Haven status at Guantanamo. Pet'n at 6.

Moreover, the Government has failed to distinguish adequately those cases where it has specifically been held that United States law applies to Guantanamo.[6] The Government's Brief contemplates a regime whereby it may pick and choose which laws and which portions of the Constitution it will apply

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sia not because that comported with established principles of fundamental constitutional jurisprudence, but because the Government had approved of that extension of rights in a letter to the United Nations. Opp. at 18 n.10. This argument is merely another attempt to vest the power of constitutional interpretation in the Executive instead of in this Court, and it should be rejected.

The third case cited in the Petition to demonstrate that the Constitution extends to areas under exclusive United States jurisdiction and control was *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979), which recognized that fundamental constitutional protections applied to the U.S.-occupied zone in Berlin. This case is not mentioned in the Opposition Brief, as apparently the Government has no answer to it.

[6] The Government argues that Petitioners' citation to *United States v. Rogers*, 388 F. Supp. 298 (E.D. Va. 1975), which found U.S. criminal law to be applicable to a U.S. citizen on Guantanamo, is improper because that case "was premised on the erroneous view that the lease agreement between the United States and Cuba provides for general application of United States law on Guantanamo." Opp. at 14 n.8. No support is offered for this contention, unless the Government means to argue that a case's holding is "erroneous" merely because the Government disapproves of its result. In challenging Petitioners' reliance on cases such as *Rogers* and *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990), the Government is seeking to advance the premise that it has the right to select which portions of United States law will apply to Guantanamo, but this hubristic theory has apparently found no support.

The Government also challenges Petitioners' reliance upon *Huerta v. United States*, 548 F.2d 343 (Ct. Cl.), *cert. denied*, 434 U.S. 828 (1977), as

in which areas, to which persons, and at which times. The Constitution and longstanding case law, however, hold otherwise. The panel's refusal to recognize the applicability of fundamental constitutional protections to the Haitian children warrants review by this Court.

CONCLUSION

For the foregoing reasons, and for all of the reasons set forth in the Petition, Petitioners request that the writ of certiorari be granted.

Respectfully submitted,

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support for the applicability of the Constitution to Guantanamo, on the grounds that the court in that case never reached the issue of the right of a Cuban national to bring a constitutional takings claim arising from conduct at Guantanamo. Opp. at 14 n.8. The Government, however, appeared to concede in that case that the takings claim was available to the Cuban plaintiff. The court therein enumerated the list of defenses that had been raised by the Government, and nowhere on that list did the Government dispute the applicability of the takings clause. *Huerta*, 548 F.2d at 344.

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Appendix A

Haitian Children Cry From Afar,
Miami Herald, May 23, 1995

By Leslie Casimir

On a 13-inch television screen, Olgine Felisme's lips trembled as she made her plea to her mom Mimose Larose. Get her out of Haiti, she said.

The 16-year-old, detained for several months at the unaccompanied Haitian minors camp at the U.S. Navy base at Guantanamo Bay, Cuba, was repatriated in March.

Her father is dead. Her mom lives in Immokalee, but the girl was somehow sent back to Haiti to live with an aunt who can no longer care for her.

"I'm not going to school, I'm not doing anything here," cried Olgine, who buried her face in her hands. "I know you are working hard to get me out of here."

At a news conference on Monday, advocates for the Haitian children in Guantanamo showed abbreviated videotaped interviews with Olgine and five other children who were repatriated by the U.S. government from the naval base.

Last week, a team was sent to Haiti by Florida Rural Legal Services to interview about a dozen unaccompanied minors who were returned to Haiti.

Most of the kids, who fled Haiti in July, said their parents or relatives were killed by the Haitian military. They fled from the country on boats without a parent or guardian and were sent to the military base. Most claim to have family living in the United States.

Attorney Cheryl Little said government agencies in charge of finding the children's relatives have for the most part ignored the relatives who live in the States.

"We're doing irreparable harm to these children," Little said. "These children have been victimized first by the Haitian military and second by the U.S. government."

Last week, the Clinton administration announced that no unaccompanied Haitian child will remain on the base past June 30. On Monday morning, 19 Haitian children and one adult were repatriated, said Capt. Jim Gray, a base spokesman. So far, about 100 children have been returned to Haiti. And more than 20 have been brought to the United States. About 200 children remain at the base.

Gina Cunningham, who was part of the interviewing team, said the children appeared to be depressed and scared.

One child is homeless and lives under a porch. Another was taken up by a stranger who lives in squalid conditions. Another girl lives with a dead aunt's neighbor.

"None of the children have enough food to eat -- they're eating one meal a day," said Cunningham, co-owner of Haitian restaurant Tap Tap. "I feel ashamed that our government has made this serious mistake."

Eight relatives who have children at the base or in Haiti also spoke at the conference held at the Notre Dame D'Haiti Catholic Church, 110 NE 62nd St.

"I feel terrible," said Roselie Lori, whose child Roseline, 12, was featured on the video. Her child lives with strangers who have the same last name, Lori.

"I can't think straight anymore. I can't sleep because I want my child to be here with me," she said. "Why is this happening to my child?"

Appendix B

U.S. May Admit 202 Haitian Kids;
For Others, Change May Be Too Late,
Miami Herald, May 17, 1995

By Christopher Marquis and Joanne Cavanaugh

Under strong humanitarian pressure, the Clinton administration is preparing to allow entry to more than 200 Haitian children now held at the U.S. Naval Base at Guantanamo Bay, Cuba, top officials said Tuesday.

The administration must still get a final green light from the Justice Department and firm up offers of sponsorships for the children before Clinton approves the arrangement, one senior White House official said. An announcement is likely by the end of the week, the official said.

"There's an understanding that there's a real need to deal with (the Haitian kids) on a compassionate basis," the official said.

But the change in policy would come too late for 26 children who along with eight adults Tuesday boarded a military cargo plane at the naval base bound for Haiti.

U.S. refugee workers were oblivious to the preparations in Washington. Some of the children expressed fear about what lay ahead as camp officials primed them for the journey. Although caseworkers insisted the children would be returned to family, some boys and girls said they have no relatives in Haiti. They worried they would wind up sleeping in the streets.

"My family died a long time ago. I don't know where they came up with the father they gave me," said a 17-year-old boy. "I don't know where I will stay."

There are now 410 Haitians, including 202 children, detained at Guantanamo. The children have been held while international relief groups and the U.S. government seek to place them with relatives in Haiti or the United States, officials said. The children, refugees interdicted at sea by the U.S. Coast Guard, have

largely resisted U.S. plans to return them to Haiti, saying they would be safer or better cared for by relatives in the United States.

The administration, which last year deployed troops to Haiti and returned the country's democratically elected president to power, has argued that most of the children should be returned to the closest relatives capable of caring for them, whether they reside in their homeland or in the United States. The administration is still operating under that plan, which calls for relocating all of the children in either location within six weeks.

The plight of the unaccompanied children has sparked an outcry from some Haitian refugee advocates, who contrast the children's continued detention in dreary camps with the administration's May 2 decision to admit most of 21,000 Cuban refugees also being held at Guantanamo.

Last week, Florida Rural Legal Services in Miami released a report that contends that some youths sent back to Haiti are living with strangers or have no homes, yet have family in the United States. The UN and the State Department are reviewing the report.

"We admit there have been problems," said Barbara Francis, a UN spokeswoman. "But we don't send kids back to the streets. We send them to their parents or a primary caregiver."

So far, international relief groups have overseen the transfer of 85 Haitian children back to Haiti, including the 26 returned Tuesday. Twenty-three children have been allowed to join relatives in the United States.

The administration hopes to firm up offers of sponsorships for the children before Clinton approves the arrangement, the White House official said.

"We will do what's in the best interest of the children," he said. At the camp Monday, workers also tried to assure the children returning to Haiti that the trip was in their best interest.

Sitting in folding metal chairs, children clutched composition books on their lap. Most were rousted from school an hour

before. Several scraped their feet on the linoleum and looked down as they heard the news many had expected.

A few raised their hands, asking questions over the hum of the window air conditioner: "Who found my family?" one incredulous youth asked. "I want whoever found my family to take me to them."

U.S. Army Col. Willie McMillian tried to ease the tension. He told them that a Westport, Conn.-based humanitarian group, Save the Children, had found their parents or close relatives.

The same group would meet them at the dock in Port-au-Prince, take them to their homes and follow-up with visits about a month later. The children were given little yellow Bibles.

On Tuesday, a charter plane of 173 Cubans left Guantanamo bound for South Florida. A half hour later, the 26 Haitian children and 8 adults boarded a military cargo plane headed for Haiti.